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ISSUES PRESENTED

1. Did the Department of Natural Resources (DNR) properly deny Petitioners' 2016 Petition for Rulemaking, both procedurally and substantively?
2. Did DNR comply with the terms of the April 4, 2017 joint Stipulation for Partial Stay and Partial Dismissal, which required it to create a phosphorus site specific criterion for Lac Courte Oreilles as well as to document its findings in a technical support document?
3. Did DNR properly promulgate Wis. Admin. Code § NR 102.06(b)(b)1.?

STATEMENT OF FACTS

I. Procedural History

On March 30, 2016, Courte Oreilles Lake Association and the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians filed a joint Petition for Rulemaking, which requested DNR promulgate an emergency rule and a permanent rule to create a phosphorus site specific criterion for Lac Courte Oreilles, lower than the current applicable statewide phosphorus criterion. (R. 2705.) As a method to resolve the 2016 Petition for Rulemaking, the parties entered into a joint Stipulation for Partial Stay and Partial Dismissal on April 4, 2017, which required DNR to create a phosphorus site specific criterion

for Lac Courte Oreilles. (Stipulation.) At the point DNR determined it could not legally or scientifically justify the creation of a phosphorus site specific criterion for Lac Courte Oreilles, DNR notified Petitioners and Petitioners filed a Petition for Judicial Review of that decision on March 23, 2018. (3/23/2018 Petition for Judicial Review.) These cases have been consolidated and give rise to the three remaining issues before the court.

II. General Lac Courte Oreilles Information

Lac Courte Oreilles (LCO), a lake in Sawyer, Wisconsin, is made up of three main “basins.” (R. 004842, 004849.) These three basins are classified together as a stratified two-story fishery lake, located in Sawyer County, Wisconsin. (R. 004842, 004849.) This means there is an upper warmwater layer in the lake, and a lower coldwater layer in the lake. As such, LCO’s main basins are all subject to the existing statewide phosphorus water quality criterion limit of 15 micrograms per liter (ug/L) for stratified two-story fishery lakes. Wis. Admin. Code § NR 102.06(4)(b)1. For purposes of this brief, DNR will refer to the three main basins as “the main basin.”

In February of 2018, DNR created a Technical Support Document (2018 TSD), which documented DNR’s research and findings with respect to the phosphorus water quality criterion for LCO. In DNR’s 2018 TSD, DNR explained that the main basins of LCO were placed on the 2018 Clean Water Act 303(d) impaired waters list because the main basin is not maintaining a

sufficient oxythermal layer thickness (OLT) for cisco and whitefish. The OLT is the section of water located between the higher warm water layer and the lower coldwater layer in the lake. The designated aquatic life use for LCO is coldwater (two story fishery) and to achieve this designated use, LCO must be able to support the cisco and whitefish in the lake. The main basin has experienced cold water species fish kills associated with oxygen depletion. (R. 004849.) The cause of insufficient dissolved oxygen and temperature levels and reduction in the OLT in the main basin is unknown. Importantly, the ambient concentration of phosphorus in the main basin is currently below the applicable statewide phosphorus criterion of 15 ug/L (R. 004845, 004859.) Wis. Admin. Code § NR 102.06(7). This means that the actual level of phosphorus in LCO is below the statewide limit criterion of 15 ug/L. *Id.*

LCO also includes a number of bays within the footprint of the lake, one of which is Musky Bay. (R. 004849–004850.) Musky Bay is considered to be an unstratified shallow drainage lake. (R. 004842.) As such, Musky Bay is subject to the statewide phosphorus water quality criterion of 40 ug/L for unstratified shallow drainage lakes. (R. 004842.) Wis. Admin. Code § NR 102.06(4)(b)3. Phosphorus levels in Musky Bay have actually decreased since 2012 and the bay currently has a phosphorus level of 29.53 ug/L, which achieves the applicable statewide phosphorus criterion of 40 ug/L (R. 004842, 004847.) In DNR's 2018 TSD, DNR determined that a phosphorus SSC more restrictive

than 40 ug/L could not be recommended at this time because it is not necessary to achieve Musky Bay's aquatic life and recreation designated uses. Musky Bay's designated uses are measured by chlorophyll *a* levels as well as whether aquatic life is protected. (R. 004893.) DNR's TSD showed that chlorophyll *a* levels are acceptable based on DNR's assessment methods, even at times when phosphorus was above 40 ug/L, and also that 40 ug/L of phosphorus appeared to be protective of aquatic life. (R. 004848.)

III. DNR's denial of the 2016 Petition for Rulemaking

On March 30, 2016, Courte Oreilles Lakes Association, Inc., (COLA) and the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians (the Tribe), petitioned DNR to promulgate a phosphorus SSC of 10 ug/L for both LCO's main basin and Musky Bay, to replace the applicable statewide criteria of 15 ug/L and 40 ug/L, respectively, for stratified two-story fishery lakes and unstratified shallow drainage lakes (hereinafter referred to as the 2016 Petition for Rulemaking). (R. 002701.) The 2016 Petition for Rulemaking was addressed to Susan L. Sylvester, who was employed at that time as the DNR Director of the Water Quality Bureau at the time. *Id.* The 2016 Petition for Rulemaking included requests for both emergency and permanent rulemaking for both LCO's main basin and Musky Bay. *Id.* Consistent with its legal authority to do so, DNR denied Petitioners' 2016 Petition for Rulemaking on May 11, 2016. (R. 003042.) Ms. Sylvester

communicated DNR's denial and signed DNR's denial of the 2016 Petition for Rulemaking on DNR letterhead and as the "Director" of the "Water Quality Bureau" of DNR. (R. 003043.) In the denial, Ms. Sylvester cc'd eight fellow DNR employees, including the Water Division Administrator, as well as one United States Environmental Protection Agency (EPA) employee. *Id.*

Further, Petitioners actually addressed their 2016 Petition for Rulemaking to Ms. Sylvester, on behalf of DNR. (R. 002701.) Ms. Sylvester acknowledged that DNR, not herself, received the 2016 Petition for Rulemaking. (R. 003042.)

DNR stated the following reasons that it denied the emergency rule request in the 2016 Petition:

"the statutory threshold for an 'emergency' has not been met. The rulemaking changes you are seeking will not address your water quality concerns. Nonpoint sources are the primary source of phosphorus loads to the lake. Development of a site specific criterion will not address the nonpoint source pollution impacts to the lake because water quality criteria are not regulatory mechanisms that require nonpoint source phosphorus reductions."

Id. DNR further stated its reason for denying the permanent rule was because it had decided "to focus its efforts on creating a rule that will establish a consistent methodology and a streamlined process for developing site specific criteria. *Id.* DNR explained that it wanted to avoid inconsistent developments

of site specific criteria and that was why it was going to wait to promulgate any site specific criteria until the new process was created. *Id.*

After this denial, Petitioners filed a petition for judicial review of DNR's denial of the 2016 Petition for Rulemaking, alleging five causes of action. (Pet'rs 6/10/2016 Petition.) Of those five causes of action, only three are currently before the court: 1) did DNR officer Susan Sylvester lack authority to deny the 2016 Petition for Rulemaking, 2) was DNR's decision to deny the 2016 Petition for Rulemaking legally erroneous, outside the agency's discretion, and arbitrary and capricious, and 3) is the statewide 15 ug/L phosphorus standard for all stratified two-story fishery lakes invalid? *Id.*

In the interest of trying to find a joint resolution, and to avoid the time and expense of litigation, the parties entered into a joint Stipulation for Partial Stay and Partial Dismissal on April 4, 2017 (Stipulation).

IV. DNR's compliance with the Stipulation, creation of a technical support document and determination on a phosphorus SSC for LCO and Musky Bay.

The Stipulation required DNR to, among other things, begin the rulemaking process (the same rulemaking process requested by Petitioners in the 2016 Petition for Rulemaking), and to "propose a phosphorus SSC for Lac Courte Oreilles...as authorized by Wis. Admin. Code § NR 102.06(7)." (Stip. 3.) Specifically at issue are provisions 3.a. and 3.e. of the Stipulation. (Pet'rs

Initial Br. 22.) In provision 3.a. of the Stipulation, “DNR agree[d] to propose a phosphorus SSC for Lac Courte Oreilles . . . as authorized by Wis. Admin. Code § NR 102.06(7).” (Stip. 3.) In provision 3.e. of the Stipulation, DNR agreed to “develop a proposed phosphorus SSC for Lac Courte Oreilles as expeditiously as practicable...” if the scope statement was approved by the Natural Resources Board (Board). (Stip. 4.) The Stipulation did “acknowledge[] that the Courte Orielles Lakes Association and its environmental consultant LimnoTech, Inc., . . . recommended a total phosphorus SSC for [all of] Lac Courte Oreilles [including Musky Bay] of 10 parts per billion...” (Stip. 4.) Consistent with provision 3.a. of the Stipulation and demonstrating that DNR was beginning the rule-making process, on August 26, 2017, DNR provided Petitioners a copy of the scope statement for them to review. (Stip. 3.) (R. 004471.) The scope statement was then submitted to the Board for their approval during the September 2017 Board Meeting. (R. 004494.) After the Boards’ approval, DNR set to work to actually create the phosphorus SSC for LCO.

Prior to DNR beginning its analysis of its own research and data, it worked with COLA and the Tribe to ensure all available data was entered into DNR’s central database for analysis and consideration. (R. 004855.) DNR ensured that it had a comprehensive dataset using all known data that could

be used for statistical analysis. *Id.* DNR reviewed the research LimnoTech relied on to propose their suggested phosphorus SSC of 10ug/L for LCO. (R. 004842.) DNR then proceeded to undertake its own research and analysis to determine whether a phosphorus SSC is legally and scientifically justified for LCO's main basin and its bays, and if so, what that SSC value should be. (R. 004842.) DNR explained its ultimate findings and recommendations on the creation of a phosphorus SSC for LCO in the TSD. (R. 004839.)

LimnoTech's report had found that low dissolved oxygen was the main problem contributing to poor fish habitat in LCO, and that LimnoTech concluded that creating a phosphorus SSC of 10 ug/L would provide a solution to that problem. (R. 004855.) DNR ultimately found that dissolved oxygen was a problem in the lake. (R. 004842–004845.) However, while DNR had initially anticipated that increased phosphorus was likely the case, DNR's subsequent research and findings did not support the hypothesis that phosphorus was the driving cause. (R. 004842–004845.)

DNR's and LimnoTech's water quality data suggest that recent fish kills in LCO are the result of low dissolved oxygen and a reduction in OLT. (R. 004865–004868.) Periods of this OLT reduction have been a limiting factor for LCO's coldwater aquatic life designated use (supporting fish like cisco and whitefish) since the beginning of the data recorded in the 1970's. (R. 004865–994868.) There is no dispute that reductions in the OLT can be caused by a

number of factors, and that one of those factors can be high concentrations of phosphorus in a water resource. (R. 004868–004871.) DNR also does not disagree that limiting phosphorus in LCO could be beneficial to LCO. However, after a detailed review of the available science and data and considerable analysis both on its own and with Petitioners, DNR’s TSD concluded the science does not support the parties’ joint initial hypothesis that phosphorus concentrations are the driving factor in reductions of OLT in LCO. (R. 004842–004845.)

In order to establish a more stringent phosphorus SSC, DNR was required to 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. 004842, 004851.)

In looking at the reasons for a decrease in dissolved oxygen, DNR considered all sources in the lake that use dissolved oxygen. (R. 004868–004884.) The different possible sources all make up and contribute to what is known as the Hypolimnetic Oxygen Demand (HOD) in the lake. (HOD). (R. 004868-004884.) As part of that analysis, DNR considered all of the possible environmental factors that could be contributing to the HOD. (R. 004868-004884.) One of the factors DNR considered was, of course, phosphorus. *Id.*

However, what DNR found through its analysis was that throughout the 30 years of monitoring data from LCO, there was little to no relationship between phosphorus and HOD and ultimately the reduction in the OLT. (R. 004870–004879.) Because of this finding, DNR could not demonstrate that the current statewide phosphorus criterion of 15 ug/L is not protective of designated uses in LCO. (R. 004888.) Therefore DNR found that, pursuant to the applicable regulations, a phosphorus SSC is not legally or scientifically justifiable for LCO at this time. (R. 004888.)

DNR's research on Musky Bay also did not legally or scientifically justify the creation of a phosphorus SSC of 10 ug/L. (R. 004903.) Musky Bay has a different lake classification and associated designated aquatic life use because it is not stratified, and the depth and temperature of Musky Bay does not provide sufficient habitat for cold water species. Because Musky Bay is classified as an unstratified shallow drainage lake that has habitat to support warmwater fisheries, it has a different applicable phosphorus criterion of 40 ug/L. (R. 004894.) These differences required DNR to use different biological metrics to evaluate whether the applicable phosphorus statewide criterion of 40 ug/L is protective of Musky Bay's designated use. (R. 004893.) As part of its analysis, DNR looked at the chlorophyll *a* levels as well as the status of the aquatic plants. *Id.*

Specifically, DNR reviewed 17 years of chlorophyll *a* and phosphorus data from Musky Bay. (R. 004895–004896.) DNR found that even in years where the phosphorus concentration was greater than 40 ug/L, chlorophyll *a* still indicated healthy conditions for recreation and aquatic life for unstratified shallow drainage lakes. (R. 004895.) In fact, in Musky Bay, the amount of chlorophyll *a* for a given phosphorus concentration was lower than expected, given the statewide relationship between phosphorus and chlorophyll *a*. *Id.* DNR also found that the applicable statewide criterion of 40 ug/L was protective of the aquatic plants in Musky Bay. (R. 004897.) Therefore, the creation of a phosphorus SSC lower than the applicable statewide criterion of 40 ug/L for Musky Bay was not scientifically or legally justified. (R. 004893.)

Once DNR completed the 2018 TSD, DNR provided it to Petitioners for their review. (R. 005637.) Petitioners provided DNR with additional information and an additional proposal, which DNR reviewed. (R. 005755, 005757.) Ultimately, even after reviewing this supplemental information from Petitioners, DNR could not conclude that a phosphorus SSC for LCO was legally or scientifically justifiable at this time. (R. 005757.)

V. DNR’s promulgation of Wis. Admin. Code § NR 102.06(4)(b)1.

DNR promulgated Wis. Admin. Code § NR 102.06(4)(b)1 pursuant to Wis. Stat. § 281.15, and the rule became effective December 1, 2010. Wis. Admin. Code § NR 102.06(4)(b)1. DNR’s determination that the appropriate

phosphorus criterion of 15 ug/L for two-story fisheries was based on evaluation of existing data. (R. 003840.)

Prior to actually beginning the rule-making process, DNR staff began technical work group meetings in March 2007 to discuss phosphorus levels in Wisconsin lakes. (R. 003840.) DNR's discussions and research were conducted by a core group of at least three DNR water specialists, and continued until at least January of 2008. (R. 03854.) DNR continued to analyze and discuss phosphorus concentrations in different types of lakes ranging from shallow drainage lakes to deep two-story lakes. (R. 003846.) After DNR's May 2007 work group meeting, DNR scheduled a meeting with members of both the University of Wisconsin and the United States Geological Survey for additional discussion and analysis. (R. 003849.)

After its initial research and analysis, DNR undertook the procedures necessary to actually promulgate Wis. Admin. Code § NR 102.06(4)(b)1. In June of 2010, DNR sent the Natural Resources Board (Board) a request for the Board to adopt what was titled, "Order WT-25-08," which included authorization to promulgate the phosphorus water quality standards criterion of 15 ug/L currently found in Wis. Admin. Code § NR 102.06(4)(b)1. (R. 003859.) DNR explained that it sought to promulgate this rule based on a

recognition of phosphorus-related water quality problems across the state, as well as to be compliant with the Clean Water Act. (R. 003860.) During the public comment and hearing period of the rule-making process, DNR received written comments and held public hearings on the proposed rule. (R. 003862.) DNR received a total of 473 written and verbal comments from municipalities, industries, organizations, agencies and individuals. (R. 003866.) DNR summarized the major issues that emerged from those comments on the proposed rule and presented its responses to those comments. (R. 003866.)

Ultimately, DNR's evaluation supported creating phosphorus criteria ranging from 15 ug/L for stratified two-story fishery lakes supporting a cold water fishery, to 40 ug/L for shallow lakes and reservoirs. (R. 003861.) To present DNR's findings that supported promulgating Wis. Admin. Code § NR 102.06(7), DNR developed the Wisconsin Phosphorus Water Quality Standards Criteria: Technical Support Document (2010 Rule TSD) pursuant to Wis. Stat. § 281.15(2)(e). (R. 003943–004167.) Part 3 of the 2010 Rule TSD outlined DNR's research and specifically addressed how DNR determined a phosphorus criterion of 15 ug/L for two-story lakes in Wisconsin. (R. 003970.) Specifically, the criterion was based on the mean concentration of reference lakes, plus one standard deviation. (R. 003970.) DNR also acknowledged that

its proposed phosphorus criterion of 15 ug/L for stratified two-story fishery lakes was “higher than [Minnesota’s proposed phosphorus criterion of] 12 ug/L.” *Id.* DNR determined, however, that the Minnesota phosphorus criterion was not representative of all stratified two-story fishery lakes in Wisconsin, and was specifically not applicable to LCO.

Minnesota’s criteria were based in part on whether or not a water body had trout in it, and also what species of trout. (R. 003991.) Minnesota presented extensive research on the effects of dissolved oxygen and fishery effects specifically in lakes with lake trout. (R. 004048–004063.) Minnesota found that 15 ug/L was “probably the upper threshold for summer mean [total phosphorus],” with regards to the maintenance of a *lake trout fishery*. (R. 004052.) Minnesota did the same type of in-depth analysis on lakes with stream trout. (R. 004061.) Minnesota’s final promulgated criteria did not establish 12 ug/L for all lakes with cold water species such as LCO. Instead, under Minnesota’s code the applicable phosphorus criterion for a lake that has cisco and whitefish but does not contain any trout, can range from a minimum phosphorus criterion of 30 ug/L to a maximum criterion of 40 ug/L. Minn. R. 7050.0222(3) and (4). Accordingly, Minnesota’s final phosphorus criteria that range from 30 ug/L to 40 ug/L for non-trout lakes such as LCO are actually significantly higher than Wisconsin’s phosphorus criterion of 15 ug/L. The final promulgated phosphorus criterion of 12 ug/L in Minnesota’s administrative

code only applies to lakes that support natural populations of lake trout, and phosphorus criterion of 20 ug/L applies to lakes where stream trout are present but no natural populations of lake trout are present. Minn. R. 7050.0222(2).

There is nothing in the Record to show that LCO is a cold water fishery that supports natural populations of lake trout. DNR referenced “EPA’s Nutrient Criteria Technical Guidance Manual for lakes and reservoirs” which Petitioners claim show that DNR’s promulgation of the phosphorus criterion of 15 ug/L is invalid. (Pet’rs Initial Br. 42–43.) DNR did not cite to this study. Rather, DNR cited to “EPA 2010 Nutrient Criteria Technical Guidance Manual: *Rivers and Streams*.” (R. 003946.) DNR cited to this document in the section of the 2010 TSD where DNR discussed the promulgation of a phosphorus criterion for rivers and streams. This document was only applicable to rivers and streams, therefore DNR did not rely on it when determining an appropriate phosphorus criterion for two-story fisheries.

DNR also cited to the Carlson Trophic Status Index in its 2010 Rule TSD. (R. 003964.) DNR specifically looked to the boundary between the lowest trophic class and the next-lowest trophic class, which is 10 ug/L for phosphorus. (R. 003964–003965.) Coldwater fish can be supported in both the lowest trophic class and the next-lowest trophic class. *Id.* Minnesota’s report,

discussed above, actually indicates that of their lake trout lakes and “successfully managed” stream trout lakes, almost 75% are in the trophic class above 10 ug/L. (R. 004048–004050, 004059–004063.)

After DNR’s research and creation of the phosphorus criterion, and pursuant to the federal requirement that DNR’s regulations be in compliance with the Clean Water Act, DNR ultimately presented its proposed phosphorus criterion of 15 ug/L to EPA for EPA’s review and approval. 40 CFR 131.21. (R. 004168.) EPA reviewed and approved the phosphorus criteria of 15 ug/L for two-story fisheries. *Id.* Wisconsin Admin. Code § NR 102.06(7) was reviewed and ultimately promulgated by the legislature and became effective December 1, 2010. Wis. Admin. Code § NR 102.06.

INTRODUCTION

The issues before the court are not as complicated or malice-filled as Petitioners would have the court believe. Rather, the many alleged claims all stem out of one central question – whether the creation of a phosphorus site SSC for LCO is legally and scientifically justifiable. Through extensive scientific and technical research and analysis, as well as the review of Petitioners’ scientific and technical research, DNR has determined that a phosphorus SSC for LCO cannot be established by respondent, Wisconsin Department of Natural Resources (DNR), under DNR’s statutory and

regulatory authority at this time. Contrary to the picture Petitioners paint, there has been no abuse of power or discretion. DNR's experts have determined that a phosphorus SSC for LCO does not satisfy the strict legal requirements necessary to create a phosphorus SSC. Petitioners challenge this determination by DNR. In doing so, they make four requests of the court.

First, Petitioners request that the court direct DNR to create a phosphorus SSC. (Pet's Initial Br. 22.) Petitioners specifically ask the court to direct DNR to proceed with a numeric phosphorus SSC for LCO that DNR experts have found is not scientifically supportable and that does not satisfy DNR's statutory requirements. *Id.* As DNR has explained to Petitioners previously, and as the record makes clear, the specific data collected for LCO does not establish that a more stringent phosphorus criterion is needed to attain the designated use of LCO. Therefore, the court should deny this request.

Second, Petitioners request that the court reverse DNR's denial of the 2016 Petition for Rulemaking of a phosphorus SSC for LCO, and remand the 2016 Petition for Rulemaking to DNR for further action. (Pet's Initial Br. 27, 31.) The procedural and substantive issues underlying these requests and the challenges to the 2016 Petition for Rulemaking are moot. Even though DNR initially denied the request to promulgate a phosphorus SSC for LCO in the 2016 Petition for Rulemaking, DNR began the rulemaking process anyway

pursuant to the parties' April 4, 2017 joint Stipulation for Partial Stay and Partial Dismissal. Even if the court finds this challenge is not moot, DNR used proper procedure and followed the applicable legal requirements necessary in its denial of the 2016 Petition for Rulemaking. Therefore, the court should deny the request to reverse DNR's denial of the 2016 Petition for Rulemaking and to remand the matter back to DNR to initiate rulemaking of a phosphorus SSC for LCO.

Third, Petitioners request that the court find that DNR's 2018 determination that a phosphorus SSC for LCO is not legally or scientifically justified at this time, and DNR's explanation of that determination in DNR's February 2018 Technical Support Document (2018 TSD) were legally flawed. (Pet'rs Initial Br. 31.) Petitioners also request the court to remand the matter of whether a phosphorus SSC is legally and scientifically justifiable to DNR to reconsider the matter based on a "proper legal, discretionary, and factual framework." (Pet'rs Initial Br. 31, 37.) There is no legal or factual basis for this request because DNR has already considered whether a phosphorus SSC is appropriate under state law based on available data and studies, and DNR has determined the requested SSC cannot be established under Wis. Stat. §§ 281.15(1), (2) and Wis. Admin. Code § NR 102.06(7). Should the court grant these requests by the Petitioners, the parties will likely end up right back

where we currently are – asking the court to make a determination on whether the science and the law supports a phosphorus SSC for LCO. The court should also deny this request.

Additionally, if Petitioners disagree with DNR's technical determination under Wis. Stat. §§ 281.15(1), (2) and Wis. Admin. Code § NR 102.06(7), and they still believe a more restrictive phosphorus SSC is necessary to protect the designated use, Petitioners may petition United States Environmental Protection Agency ("EPA") to "propose and promulgate a regulation . . . setting forth a new or revised standard upon determining such a standard is necessary to meet the requirements of the [Clean Water] Act." 40 CFR § 131.22(b). DNR does not believe that EPA will reach a different conclusion as to the requirement of a phosphorus SSC for LCO. However, this is a procedural option available to Petitioners.

Finally, Petitioners request that, as an alternative to the court ordering DNR to promulgate a phosphorus SSC for LCO, the court declare that the phosphorus criterion of 15 ug/L in Wis. Admin. Code § NR 102.06(4)(b)1., which applies to all of the stratified two-story fisheries in the state, and which is less onerous than the criterion which Petitioners would like imposed for LCO, to be invalid. (Pet.rs' Initial Br. 37.) This request to invalidate the existing criterion of 15 ug/L statewide entirely contradicts the Petitioners' assertion that a more stringent phosphorus limit in LCO is the only way to halt the degradation of

LCO's water quality. Importantly, Petitioners have failed to provide any supporting data or technical analysis that specifically explains why the existing phosphorus criterion of 15 ug/L is not protective enough for the other two-story fishery lakes in the state, and how invalidating that statewide criterion will benefit the state. Additionally, EPA approved Wis. Admin. Code § NR 102.06(4)(b)1. in December of 2010. (R. 004168.) The court should also deny this request.

ARGUMENT

As evidenced by the expansive record, DNR has worked in cooperation with the Petitioners in an attempt to create a legally and scientifically justified phosphorus SSC for LCO. Unfortunately, DNR has determined that neither DNR's extensive research nor the Petitioners' research justifies the creation of a phosphorus SSC for LCO at this time. Further, Petitioners are not entitled to the relief they seek under either the 2016 Petition for Rulemaking, the 2016 Petition for Judicial Review, or the Stipulation. Therefore, Petitioners' requested remedies should not be granted. For all of these reasons, the Court should deny Petitioners' requests and find that DNR took all necessary actions under both the Stipulation and Wisconsin law to attempt to create a phosphorus SSC. Importantly, should the court decide to order DNR to create a more stringent phosphorus SSC for LCO and proceed with rulemaking, it will be requiring DNR to take an action that it cannot scientifically defend and that

exceeds the authority under Wis. Stat. § 281.15(2). That is ultimately the prerogative of the legislature rather than the court.

I. DNR properly denied the 2016 Petition for Rulemaking.

A. Standard of Review

Regarding the standard of review applicable to a claimed erroneous interpretation of law or exercise of discretion in DNR's denial of the 2016 Petition for Rulemaking, "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(5). If the agency's action depends on facts determined without a hearing and the facts compel a particular action as a matter of law, "the court shall set aside, modify or order agency action." Wis. Stat. § 227.57(7). Alternatively, if the agency's action depends on facts without a hearing the court may remand the case to the agency "for further examination and action within the agency's responsibility." Wis. Stat. § 277.57(7).

Further, the questions of whether DNR properly interpreted a law or whether actions were compelled as a matter of law, are both questions of law to be reviewed *de novo*. *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21. (holding that the

deference doctrine no longer applies and therefore questions of law will be reviewed de novo, but also holding that giving “due weight” consideration to an agency’s experience, technical competence, and specialized knowledge means, as a matter of persuasion, giving respectful consideration to an agency’s views while the court exercises its independent judgment in deciding questions of law.) “Due weight” consideration considers the persuasiveness of the agency’s perspective. *Id.* ¶ 79. That persuasiveness is determined by assessing the following factors: “(1) whether the legislature made the agency responsible for administering the statute in question; (2) the length of time the administrative agency’s interpretation has stood; (3) the extent to which the agency used its expertise or specialized knowledge in developing its position; and (4) whether the agency’s perspective would enhance uniformity and consistency of the law.”

Id.

B. DNR, as an agency, is legally authorized to deny a petition for rulemaking, and is afforded great discretion by the law in doing so.

Wisconsin Stat. § 227.12(1) allows for “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 may petition an agency requesting it to promulgate a rule.” The form of petitions for promulgating a rule is specified in Wis. Admin. Code § NR 2.05(2). Once a petition is received by an agency, and within a reasonable period of time after the receipt of a

petition under Wis. Stat. § 227.12(3), “an agency shall either deny the petition in writing or proceed with the requested rule making.” Agency is defined as “a board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer.” Should the agency decide to grant the petition for rulemaking, Wis. Stat. § 227.135 sets out procedural steps an agency must follow. Specifically, if an agency decides to grant the petition for rulemaking and promulgate a rule, the rulemaking process begins by first preparing a scope statement and then presenting that scope statement to both the Department of Administration and then to the Governor for approval. Wis. Stat. § 227.135(2). If the Governor provides written approval of the scope statement for rulemaking, then the agency may submit the scope statement to the legislative reference bureau for publication in the Wisconsin Administrative Register. An agency is also required to submit the scope statement to the individual or body with policy making powers over the subject matter, but *the body with policy making powers may not approve a scope statement which initiates the rulemaking process until 10 days after the legislative reference bureau has published the scope statement in the Wisconsin Administrative Register.* Wis Stat. s. 227.135(2) and (3) (emphasis added.)

Should the agency decide to deny the petition for rulemaking, as DNR did in this case, there are no additional steps that must be followed aside from

communicating that denial in writing. Wis. Stat. § 227.12. The statute effectively grants the agency full discretion to either grant or deny a petition for rulemaking. There is also no rule that dictates considerations the agency must give prior to denying a petition for rulemaking,

Further, DNR is unaware of any statute or rule that requires, nor do Petitioners point to any statute or rule that requires DNR to submit their decision to deny a petition for rulemaking to the Board for approval.

C. The issue of whether DNR substantively and procedurally properly denied the 2016 Petition for Rulemaking is moot.

The issue of whether DNR substantively and procedurally properly denied the 2016 Petition for Rulemaking is moot.

The question of whether DNR properly denied the 2016 Petition for Rulemaking is a moot issue. “An issue is moot when the court concludes that its resolution cannot have any practical effect on the existing controversy. *PRN Associates LLC v. State, Department of Administration*, 2009 WI 53, ¶ 25, 317 Wis. 2d 656, 766 N.W.2d 559. (holding that a petition for judicial review was rendered moot because there was no remedy that could be granted to the petitioners at that time.) Further, “[t]he court of appeals has explained that ‘a moot question is one which circumstances have rendered purely academic.’” *Id.* ¶ 29. (quoting *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425.)

Under the terms of the Stipulation, the parties entered into a stay of Petitioners’ 2016 Petition for Rulemaking, in which DNR agreed to initiate the rulemaking procedure for a phosphorus SSC for LCO. (Stip. 3.) DNR initiated this process on April 26, 2017, when DNR notified Petitioners that DNR had created a draft scope statement to promulgate the phosphorus SSC for LCO. (R. 004471.) Petitioners now request the court remand the 2016 Petition “for further action.” (Pet’rs Initial Br. 27.) However, the only further action Petitioners’ could request from the court is for DNR to re-initiate rulemaking to promulgate a phosphorus SSC for LCO, which DNR previously terminated because it was not legally and scientifically feasible to do so. Under these circumstances, there is no remedy which this court could reasonably grant Petitioners at this time. *Olson*, 317 Wis. 2d 656, ¶ 3. For this reason, the court should deny Petitioners’ request.

D. Ms. Sylvester Properly Communicated DNR’s Decision to deny the 2016 Petition for Rulemaking

Even if the court finds this issue is not moot the Board is not the only entity authorized to deny a petition for rulemaking. Additionally, Ms. Sylvester properly communicated DNR’s denial of the 2016 Petition for Rulemaking.

First, there is no statute that requires a petition for rulemaking be denied only by the Board. Petitioners incorrectly cite to Wis. Stat. § 15.05(1)(b) for the proposition that “[t]he Board sets policy for the agency, including

approving all rulemaking.” (Pet’rs Initial Br. 25.) This provision is not applicable because Wis. Stat. § 15.05(1)(b) applies to departments where the secretary is appointed by the board. However, “[t]he secretary of natural resources [is] nominated by the governor...,” therefore Wis. Stat. § 15.05(1)(b) is inapplicable and Petitioners argument fails. Wis. Stat. § 15.05(1)(c). There is no provision that establishes that the Board is the only entity allowed to deny a petition for rulemaking on behalf of DNR.

Second, Wis. Stat. § 227.12(3) explicitly states that after a petition for rulemaking is received, “an agency shall either deny the petition in writing or proceed with the requested rule making.” Agency is defined as, “a board, commission, committee, *department* or officer in the state government.” Wis. Stat. s. 227.01(1) (emphasis added). Petitioners concede that DNR, not Ms. Sylvester, denied the 2016 Petition. (Pet’rs Initial Br. 27.)

Even with Petitioners’ concession, Ms. Sylvester did not improperly communicate DNR’s denial. Ms. Sylvester was acting within the scope of her employment with DNR, as an officer of DNR, not as a private citizen, when she communicated DNR’s denial of the 2016 Petition for Rulemaking. (R. 003043.) This is evidenced by the following facts. First, the denial states specifically, “*the Department* is denying your request for emergency and permanent rulemaking,” not that Ms. Sylvester denied the request. (R. 003042) (emphasis added). Second, Ms. Sylvester signed the denial of the 2016 Petition for

Rulemaking as the “Director” of the “Water Quality Bureau” of DNR. (R. 003043.) Third, Ms. Sylvester cc’d eight fellow DNR employees, including the Water Division Administrator, as well as one EPA employee, in the denial. *Id.* Finally, the denial of the 2016 Petition was written on DNR letterhead, not the personal stationery of Ms. Sylvester. (R. 003042.) Acting as an officer of DNR, Ms. Sylvester issued DNR’s denial of the 2016 Petition for Rulemaking. (R. 003042.)

Further, Petitioners actually addressed their 2016 Petition for Rulemaking to Ms. Sylvester, on behalf of DNR. (R. 002701.) Ms. Sylvester acknowledged that DNR, not herself, received the 2016 Petition for Rulemaking. (R. 003042.) It is telling that Petitioners fail to explain why they found that Ms. Sylvester could receive the 2016 Petition for Rulemaking on behalf of DNR, but could not communicate the denial on behalf of DNR. (R. 002701.)

Petitioners’ additional assertion that only the Board can deny a petition for rulemaking ignores the language in Wis. Stat. § 227.12(3) which provides that “an *agency* shall [] deny the petition in writing.” (emphasis added). Again, under Wis. Stat. § 227.01(1), the term “agency” also includes commission, *department* or officer in the state government, in addition to a board. Courts have commonly held that “statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole,” and that when reading

a statute to give reasonable effect to every word “yields a plain, clear statutory meaning, then there is no ambiguity.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. There is no ambiguity that an agency is the body that must grant or deny a petition for rulemaking. Wis. Stat. § 227.12(3). There is also no ambiguity that the definition of “agency,” includes other entities besides a board. Wis. Stat. § 227.01(1). Petitioners’ assertion that only the agency acting through the Board can make rulemaking and other regulatory decisions goes directly against the unambiguous plain language of Wis. Stat. §§ 227.12(3) and 227.01(1). As such, Board being the only entity allowed to review and determine whether to grant or deny a petition for rulemaking is not only not required, it is not authorized by law. Wis. Stat. § 227.10(2m).

Petitioners cannot simply assert that the statutory definition of “agency” should be void and the court should determine that the Board is the only entity that can decide to deny a petition for rulemaking. Ultimately, DNR did not commit any material error in procedure and did not fail to follow prescribed procedure. DNR followed the regulatory requirements set out in Wis. Stat. § 227.12. The communication of DNR’s denial of the 2016 Petition without Natural Resources Board involvement was therefore proper.

E. DNR's basis for denying the 2016 Petition was not legally erroneous, an abuse of discretion, or arbitrary and capricious.

DNR's decision to deny the 2016 Petition for Rulemaking was within its legal authority. Petitioners fail to show how DNR did not comply with any statutory or regulatory requirements in denying the 2016 Petition for Rulemaking. Wisconsin Stat. § 227.12 does not provide any criteria or considerations for denying a petition for rulemaking. The decision to grant or deny a petition for rulemaking is entirely discretionary. *See* Wis. Stat. § 227.12 and Wis. Admin. Code ch. NR 2. Petitioners fail to point to any other legal requirements DNR must follow in order for it to deny a petition for rulemaking.

That said, DNR did communicate its reasoning for denying the 2016 Petition for Rulemaking and DNR's reasons for denying the 2016 Petition for Rulemaking were reasonable. (R. 003042.) DNR stated the following reasons for denying the emergency rule request in the 2016 Petition:

“the statutory threshold for an ‘emergency’ has not been met. The rulemaking changes you are seeking will not address your water quality concerns. Nonpoint sources are the primary source of phosphorus loads to the lake. Development of a site specific criterion will not address the nonpoint source pollution impacts to the lake because water quality criteria are not regulatory mechanisms that require nonpoint source phosphorus reductions.”

Id. DNR further stated its reason for denying the permanent rule was because it had decided “to focus its efforts on creating a rule that will establish a

consistent methodology and a streamlined process for developing site specific criteria. *Id.* DNR explained that it wanted to avoid inconsistent developments of site specific criteria and that was why it was going to wait to promulgate any site specific criteria until the new process was created. *Id.*

Petitioners argue that DNR's denial of the 2016 Petition for Rulemaking meant that DNR was no longer going to implement Wis. Admin. Code § NR 102.06(7) and that DNR effectively declared it no longer had any effect. This argument is not based in fact.¹ DNR actually stated it was not going to be "reviewing or making approval decisions on individual [SSC] requests" until it had completed the rulemaking process for the new streamlined process for developing a phosphorus SSC and for reasons explained in the scope statement, DNR is currently developing phosphorus SSCs for three reservoirs in the Wisconsin River Basin. (R. 003042–003043.)

¹Wisconsin Admin. Code § NR 102.06(7) states, "[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 rational demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody."

Petitioners over-dramatization of DNR's basis for denying the 2016 Petition for Rulemaking is only that. Regardless, DNR's decision was well within its discretion under Wis. Stat. § 227.12(3), and Petitioners fail to point to anything that shows the contrary. DNR even went above and beyond the statutory requirement in spelling out the reasoning for its denial. (R. 003042–003043.) Therefore, the court should deny Petitioners' request.

II. DNR did not violate the terms of the Stipulation in its ability to create a phosphorus SSC for LCO.

A. Standard of Review

“The 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. Further, principles of contract law apply in interpreting stipulations. *Id.* ¶ 67. “Contract interpretation . . . [is a] question[] of law we review de novo.” *Huml v. Vlazny*, 2006 WI 87, ¶ 13, 293 Wis. 2d 169, 716 N.W.2d 807.

Regarding the standard of review applicable to a claimed erroneous interpretation of law or exercise of discretion in DNR's 2018 TSD, the standard of review for this issue is the same standard as applied for review of DNR's denial of the 2016 Petition for Rulemaking, as explained above, which is to say de novo with due weight deference considerations. *Tetra Tech EC Inc.*, 382 Wis. 2d 496, ¶ 79.

B. DNR must meet strict legal guidelines when developing a SSC.

Wisconsin Stat. § 281.15(1) provides that water quality criteria promulgated by DNR

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.

However, that is not the only legal requirement that governs water quality criteria in Wisconsin. The legislature established two additional and more specific requirements regarding DNR's authority to promulgate water quality criteria, including an administrative rule relating to creating a phosphorus SSC.

First, the legislature enacted Wis. Stat. § 281.15(2)(c), which requires DNR to “[e]stablish criteria which are no more stringent than reasonably necessary to assure attainment of the designated use for the water bodies in question.” Second, and specific to phosphorus SSCs, the DNR promulgated and the legislature approved Wis. Admin. Code § NR 102.06(7), which provides that DNR may establish a phosphorus SSC only “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.” Therefore, DNR must satisfy the requirements in Wis. Stat. §§281.15(1), (2)(c) and Wis. Admin. Code § NR 102.06(7), and not just those in Wis. Stat § 281.15(1) as Petitioners suggest.

These statutory and regulatory requirements overlap to create a narrow window, or as Petitioners refer to it, a “sweet spot,” for which a phosphorus SSC can be legally promulgated for a waterbody. (Pet’rs Initial Br. 33.) That sweet spot falls where DNR can demonstrate that a phosphorus SSC *will be protective* of the designated use *but not more stringent than necessary* to assure attainment. Wis. Stat. §§ 281.15(1) and (2). It is the *plain language* of the law itself that creates this narrowly tailored legal authority to promulgate a phosphorus SSC, *not DNR’s interpretation* of the law. (Pet’rs Initial Br. 33–36.)

An additional requirement that DNR must comply with to adopt or review any water quality criteria for the waters of the state or any designated portion thereof is to “[d]evelop 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 the water quality criteria, including the persistence, degradability and nature and effects of each substance on the designated uses, and which provides a summary of the information considered under this section.” Wis. Stat. § 281.15(2)(e). Therefore, at least part of DNR’s TSD must address how the phosphorus SSC is necessary to protect the designated use but is not more stringent than necessary to assure

attainment. The TSD must also provide a summary of the information reasonably available to DNR, and the reasonable statistical techniques DNR used in interpreting the relevant water quality data. Wis. Stat. §§ 281.15(2)(b) and (d). Contrary to Petitioners' assertions, there is no alternative legal or factual framework under which DNR should create a TSD or complete the research and analysis documented in the TSD. (Pet'rs Initial Br. 37.) The TSD was not based on an erroneous interpretation of law or exercise of DNR's discretion, as Petitioners assert. Rather, DNR's findings and conclusions in the TSD were predicated on *all* of the applicable laws governing the promulgation of a phosphorus SSC, rather than Petitioners' reliance on only *one* of the applicable laws. (Pet'rs Initial Br. 31, 33.) *See* Wis. Stat. §§ 281.15(1), (2)(c) and Wis. Admin. Code § NR 102.06(7).

Finally, Petitioners discuss the Treaty of 1837. (Pet'rs Initial Br. 15–16.) It is unclear what Petitioners are asserting as there is not an alleged violation of treaty rights in this case. (Pet'rs Initial Br. 15–16.) Accordingly, DNR requests the court disregard Petitioners' discussion of the Treaty of 1837.

C. DNR's development of the 2018 TSD and determination that a phosphorus SSC for LCO could not be developed was consistent with state statutes and regulations.

DNR's 2018 TSD considered both DNR's own research and scientific analysis, as well as the research and analysis that had been completed by the Petitioners. (R. 004855.) DNR ultimately agreed with Petitioners' findings that

dissolved oxygen is a problem in LCO, but did not come to the same conclusion that phosphorus is directly responsible for the low dissolved oxygen in LCO. (R. 004844.) The water quality data clearly suggest that recent fish kills in the LCO are the result of low dissolved oxygen and a reduction on the OLT. (R. 004865–004868.) This reduction in the OLT is negatively impacting LCO's coldwater aquatic life designated use. *Id.* The heart of the factual dispute is whether ambient phosphorus concentrations in the main basins are negatively impacting the OLT in this particular lake. DNR found it was unclear whether reducing phosphorus concentrations in LCO would improve dissolved oxygen in the OLT. (R. 004865–004871.) Petitioners believe this is the case, but DNR was unable to scientifically find, based on a review of historical data, that there is a causal link between phosphorus and the OLT in LCO such that DNR could legally justify creating a more restrictive phosphorus SSC. (R. 004842–004845.) Additionally, DNR reviewed Musky Bay and determined that both its chlorophyll *a* levels and aquatic plant community indicated support of its aquatic life and recreation designated uses, and a more stringent SSC was not warranted. (R. 004893.)

DNR does not disagree that limiting phosphorus in LCO could be beneficial to the lake. As addressed above, however, the statutes and rules that authorize DNR to establish a phosphorus SSC require a robust, science-driven demonstration, not just speculation, and the evaluation of historical data did

not establish a causal link between phosphorus and the OLT in the main basins of LCO. (R. 005757.) 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. Wis. Stat. § 281.15(2)(c) and Wis. Admin. Code § NR 102.06(7). DNR cannot conclude, based on existing data, that the phosphorus SSCs proposed by Petitioners meet these standards. (R. 004842–004845.)

DNR provided the 2018 TSD to the Petitioners who had their consultant, LimnoTech, review and evaluate it. (R. 005637, 005755, 005757.) DNR reviewed Petitioners' two supplemental submittals and the revised calculations for a SSC, and *still* could not legally justify the creation of a phosphorus SSC for LCO. (R. 005757.)

DNR's TSD was created in accordance with Wis. Admin. Code § NR 102.06(7)(d), and DNR's conclusions documented in the 2018 TSD were not an abuse of DNR's discretion. Petitioners' assertion that DNR improperly exercised its discretion by erroneously interpreting the law is predicated on only reading Wis. Stat. § 281.15(1). However, as explained previously, the creation of a phosphorus SSC also requires compliance with Wis. Stat. § 281.15(2) and Wis. Admin. Code § NR 102.06(7)(c). Importantly, this is the only legal framework that governs the creation and content of a TSD and there is little discretion afforded to DNR based on the narrow confines created by the

statutes and rule regarding the development of a SSC. To the extent Petitioners request that the court remand the 2018 TSD back to DNR to follow a different legal and discretionary framework, it is entirely unclear what the alternative legal framework would be. (Pet'rs Initial Br. 37.)

In addition to their arguments that DNR was legally obligated and authorized to create a phosphorus SSC for LCO, Petitioners also assert that “DNR’s interpretation of Wis. Stat. § 281.15 and NR 102.06 will permit phosphorus levels to continue increasing in the lake.” (Pet’rs Initial Br. 34.) This claim is unsubstantiated by Petitioners, and is therefore also not sufficient to legally justify the creation of a phosphorus SSC in LCO.

D. DNR complied with the Stipulation.

The parties agree that DNR complied with subparagraphs 3.b. through 3.d. of the Stipulation (Pet’rs Initial Br. 22.) The subparagraphs in dispute, subparagraphs 3.a. and 3.g., required DNR to review relevant data and studies and propose a phosphorus SSC as authorized by Wis. Admin. Code § NR 102.06(7). (Stip. 3.) DNR not only complied with the Stipulation, it also based its findings and conclusions in the 2018 TSD on proper interpretation of law and exercise of discretion.

As documented in the 2018 TSD, DNR lacked both legal authority and the necessary scientific rationale to justify the creation of a phosphorus SSC under Wis. Stat. §§ 281.15(1), (2) and Wis. Admin. Code § NR 102.06(7). DNR

could not promulgate a phosphorus SSC as authorized under Wis. Admin. Code § NR 102.07, pursuant to subparagraph 3.a. of the Stipulation. (Stip. 3.) (R. 004842–004845.) DNR went as far as it could to legally comply with the Stipulation. DNR did not apply an excessively narrow interpretation of its authority, it simply followed the plain language of state statutes and rules to determine it could not meet the legal burden to justify creating a phosphorus SSC for LCO. Contrary to Petitioners' assertions, DNR's conclusions were not flawed. Rather, unlike Petitioners, DNR applied all the applicable laws, and considered all of the evidence, including the information provided by Petitioner's consultant, historical data and its own research. Based on that information, it reached a reasoned, legally sound conclusion that the facts did not justify creating a phosphorus SSC for LCO. While Petitioners may disagree with DNR's conclusions, they have not shown that it abused its discretion in reaching them.

DNR did not maliciously enter into the Stipulation simply as a delay tactic or to mislead Petitioners. DNR wholeheartedly believed that the scientific research and analysis would demonstrate that a lower phosphorus SSC would be necessary to protect the designated uses in LCO. However, as explained in the TSD, the science simply does not support that conclusion and therefore DNR is not legally authorized to promulgate a phosphorus SSC. The court should therefore find either that DNR complied with the Stipulation to

the extent legally possible and that it soundly exercised its discretion in determining that it could not create the SSC.

III. DNR properly promulgated the 15 ug/L standard for phosphorus in Wis. Admin. Code § NR 102.06(4)(b)1., and did not exceed its statutory authority in doing so.

A. Standard of Review

Courts have held that resolving a conflict between a statute and interpretive rule that requires statutory interpretation is a question of law that should be reviewed *de novo*. *Wisconsin Association of State Prosecutors v. Wisconsin Employment Relations Commission*, 2018 WI 17, ¶ 31, 380 Wis. 2d 1, 907 N.W.2d 425. Courts have also held that whether a rule violates the state constitution is a question of law subject to *de novo* review. *Tetra Tech EC, Inc.*, 382 Wis. 2d 496, ¶ 108.

B. DNR has the authority to promulgate rules in accordance with authorizing statutes.

The legislature has granted agencies, including DNR, the authority to promulgate rules pursuant to Wis. Stat. § 227.11(2)(a), which states, “[e]ach agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute.” Wisconsin Stat. ch. 227 then goes on to prescribe the specific steps that an agency must take in order to legally promulgate a rule. Some of these steps require the agency to allow for a period

of time to receive comments from the public, such as Petitioners or concerned citizens of COLA, on the proposed rules, both in written and hearing formats.

Wis. Stat. § 227.136.

Once an agency has fully promulgated a rule, it must file a certified copy of each rule with the legislative reference bureau. Wis. Stat. § 227.20(1). The statute ultimately creates a number of presumptions that are effective when the agency files a certified copy of a rule with the legislative reference bureau. Wis. Stat. § 227.20(3). These presumptions include that the rule was duly promulgated by the agency, the rule was filed and made available for public inspection on the date and time endorsed on it, that all of the applicable rule-making procedures were complied with, and that the text of the certified copy of the rule is the text as promulgated by the agency. Wis. Stat. § 227.20(3). The statute does not indicate that any of these presumptions are weighed heavier than any other. *Id.* Lastly and specific to any promulgated water quality standards, to comply with the federal Clean Water Act, water quality standards promulgated by the state must be submitted to the US Environmental Protection Agency (EPA) for review and approval to ensure compliance with the requirements of the Clean Water Act. 30 CFR § 131.21.

Wis. Stat. § 227.40(4)(a), then, creates the authority to challenge a rule that has been promulgated, where it states “the court shall declare the 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.” Petitioners are challenging the validity of Wis. Admin. Code § NR 102.06(4)(b)1., which establishes a phosphorus criterion “[f]or stratified, two-story fishery lakes, [of] 15 ug/L.” This provision, as well as Wis. Admin. Code ch. NR 102 generally, was promulgated to establish “water quality standards for surface waters of the state pursuant to s. 281.15, Stats.” Wisconsin Admin. Code § NR 102.01(1). Wisconsin Stat. § 281.15(1) states:

[t]he department shall promulgate rules setting standards of water quality to be applicable to the waters of the state . . . 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 . . .

Ultimately, DNR properly promulgated Wis. Admin. Code § NR 102.06(4)(b)1. in accordance with all of the applicable state requirements, as well as pursuant to the applicable requirements of the Clean Water Act.

C. Wisconsin Admin. Code § NR 102.06(4)(b)1. is not inconsistent with Wis. Stat. § 281.15

Wisconsin Admin. Code § NR 102.06(4)(b)1. is not in conflict with Wis. Stat. § 281.15, and therefore DNR did not act outside of its statutory authority

in promulgating Wis. Admin. Code § NR 102.06(4)(b)1. Additionally, Petitioners' arguments in support of this claim include some statements that are not supported by the record, and other statements that are untrue. These issues will be addressed in turn.

“In determining whether an administrative agency exceeded the scope of its authority in promulgating a rule, [the court] must examine the enabling statute to ascertain whether the statute grants express or implied authorization for the rule.” *Wisconsin Association of State Prosecutors*, 301 Wis. 2d 1, ¶ 37 (quoting *Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Department of Natural Resources*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612) (holding that the Wisconsin Employment Relations Commission did not exceed its statutory authority in promulgating two administrative rules.)

DNR promulgated Wis. Admin. Code § NR 102.06(4)(b)1. to adopt numeric phosphorus water quality standard criteria for lakes, pursuant to its authority and obligation under Wis. Stat. § 281.15. DNR undertook this promulgation in response to federal regulations and in response to results of studies published in 2006 and 2008 which provided sufficient information to establish statewide phosphorus water quality standards that were protective of the designated uses in Wisconsin's waters. (R. 003861.)

The statutory requirements DNR was working within included Wis. Stat. § 281.15, which states, “[t]he department shall promulgate rules setting standards of water quality to be applicable to the waters of the state . . . Water quality standards shall protect the public interest.” Additionally, Wis. Stat. § 281.15(2) states that, “[i]n adopting or revising any water quality criteria . . . the department shall . . . consider information reasonably available to the department . . . [e]stablish criteria which are no more stringent than reasonably necessary to assure attainment of the designated use . . . [e]mploy reasonable statistical techniques . . . [and] [d]evelop a technical support document.” DNR’s 2010 Rule TSD documented that DNR considered information reasonably available to it, that DNR employed reasonable statistical techniques, and that DNR established a phosphorus criterion that was reasonably protective of the designated use of two-story fisheries, but that was not more stringent than necessary to be protective of that designated use. (R. 003964–003975.) DNR considered a large amount of information available to it in its analysis of an appropriate phosphorus criterion in its promulgation of Wis. Admin. Code § NR 102.06(4)(b)1. (R. 003964–003975.)

Further, DNR’s proposed phosphorus criterion of 15 ug/L was subject to public comment, public hearings, legislative review, and EPA review and comment. Wis. Stat. § 227.20. (R. 003866–003899.) Importantly, after all of these stages of review and comment, the legislature determined that this rule

was legal as demonstrated by the fact that it was ultimately promulgated and is now valid law. Wis. Admin. Code § NR 102.06(4)(b)1. And if that were not enough to sufficiently prove that DNR acted within its statutory authority to create a protective water quality standard, EPA then provided the ultimate review and approval of the statewide phosphorus criterion for two-story fisheries of 15 ug/L. (R. 004168.)

In attempting to support their assertion that Wis. Admin. Code § NR 102.06(4)(b)1. is invalid, Petitioners make a number of assertions that are not true. First, in multiple places Petitioners talk about DNR's admission that the standard of 15 ug/L does not protect the fish and aquatic life recreational

uses. (Pet’rs Initial Br. 40, 42.) Petitioners do not support this assertion with any citation to the record, nor can DNR find anywhere in the record where this was stated by DNR. *Id.* Next, Petitioners quote a portion of the 2010 Rule TSD that talks about the fact that 15 ug/L “would seem to result in a concentration too high to support *a lake trout fishery.*” (Pet’rs Initial Br. 41, R. 003970.) Petitioners state that this sentence is “disturbing,” and that it is a concession by DNR that the standard will not assure attainment of designated uses. (Pet’rs Initial Br. 41.) However, the only thing DNR is conceding to, if anything, is that the 15 ug/L phosphorus criterion may be on the high end for the very few lakes in Wisconsin classified as *a lake trout fishery.* (R. 003970.) This makes sense given DNR’s reliance on Minnesota’s study, and the fact that Minnesota ultimately proposed lower phosphorus criterion ranges for lakes that support lake trout. (R. 004051.) But what Minnesota actually stated with respect to maintaining the quality of a fishery supporting lake trout is that 15 ug/L was likely the upper threshold of the limit.² (R. 004051.) A more appropriate interpretation of DNR’s statement is that the fact that 15 ug/L is on the high end for supporting a lake trout fishery and thus may make certain lake trout-supporting two-story fisheries candidates for a phosphorus SSC.

²This implies that Minnesota recognized that even 15 ug/L could be protective, but would likely be the upper limit of criteria for the phosphorus threshold.

Petitioners' failure to paint the whole picture for the court, then, becomes very important. (R. 003970.) Very few two-story fisheries in Wisconsin have lake trout. In fact, LCO is one of those two-story fisheries that does not support lake trout. (R. 004849, 004852.) This general and inaccurate assertion by Petitioners does nothing to demonstrate that DNR was acting outside of its statutory authority when it promulgated Wis. Admin. Code § NR 102.06(4)(b)1.

Second, Petitioners raise the issue of EPA's Nutrient Criteria Guidance Manual and whether DNR cited it. (Pet'rs Initial Br. 43.) Although DNR did not directly cite to "EPA's Nutrient Criteria Guidance Manual: Lakes and Reservoirs," DNR's methods for developing its two-story fishery criteria are in line with methods recommended by EPA in its guidance manual, namely using the mean concentration of reference sites plus one standard deviation (R. 003970.) The EPA manual does not recommend specific phosphorus concentrations for different lake types; it focuses on various methods for developing criteria, and DNR's selected method was in line with this guidance.

Third, Petitioners imply that DNR's final criterion is not in line with the Carlson Trophic Status Index. (Pet'rs Initial Br. 42.) However, Petitioners fail to explain how the state's applicable statewide phosphorus criterion is in line with this index and Petitioners arguments are not compelling.

Petitioners end by asserting that DNR's methodology used for setting the 15 ug/L criterion for two-story fisheries was flawed. (Pet'rs Initial Br. 44.)

Petitioners assert that it was flawed simply because DNR used a different methodology to establish the criteria for different types of lakes, including two-story fisheries, as well as streams and rivers. *Id.* The 2010 Rule TSD explains the difference between lakes and streams (i.e., streams are flowing waters), and how phosphorus interacts differently among these different types of water bodies. (R. 003945–003966.) It is not surprising then, given the multitude of differences between different types of waterbodies, that DNR would utilize different methods to set the phosphorus criteria for the separate types of waterbodies. Petitioners also go back to Minnesota’s findings and assert that DNR utilized some of Minnesota’s suggested criteria while blatantly not using the two-story fishery standard. Again, the discussion of Minnesota’s two-story fishery criterion is limited in scope because the 12 ug/L criterion in Minnesota’s code only applies to lakes that support naturally reproducing lake trout Minn. R. 7050.0222(2). Petitioners did not submit any data or analysis on other two story lakes with lake trout in the state.

Petitioners simply fail to demonstrate that the 15 ug/L total phosphorus water quality standard for two-story fisheries is not supported by DNR’s research and findings and that DNR failed to create a phosphorus criterion that is protective of the designated uses of two-story fisheries. Therefore, the court should deny Petitioners’ request to invalidate Wis. Admin. Code § NR 102.06(4)(b)1.

D. Wisconsin Admin. Code § NR 102.06(4)(b)1 does not violate the Public Trust Doctrine.

Petitioners go on to make unsubstantiated assertions that the 15 ug/L phosphorus criterion for two-story fisheries violates the Public Trust Doctrine. (Pet'rs Initial Br. 45.) Petitioners assert that "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." *Id.* Petitioners first state that "[t]he record demonstrates that DNR understood 15 ug/L 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." (Pet'rs Initial Br. 46.) This statement is incorrect. DNR determined that 15 ug/L was an adequate level of protection to maintain Wisconsin's coldwater fisheries (providing for SSC exceptions when needed),

and that this concentration is also below the levels that would allow for adequate clarity for safe swimming and very low percent frequency for algal blooms. (R. 003847.) It is unclear how this scientific conclusion by DNR supports Petitioners' assertion that a phosphorus criterion of 15 ug/L is not protective of lake water quality for the public benefit. Petitioners then go on to again cite to Minnesota's use of a phosphorus criterion of 12 ug/L for two-story fisheries with lake trout. (Pet'rs Initial Br. 46.) For all of the reasons previously discussed, this also fails to demonstrate how DNR's phosphorus criterion of 15 ug/L for two-story fisheries, not all of which include lake trout, is not protective of lake water quality for the public benefit. DNR addressed this discrepancy by presenting an option for those two-story fisheries that have lake trout for which a phosphorus criterion of 15 ug/L might not be protective by acknowledging that some of these lakes may be eligible for a SSC. (R. 003970.) LCO is not one of the lakes, and Petitioners did not assert that LCO is one of those lakes, that has natural populations of lake trout.

It is worth noting that should the court decide to invalidate Wis. Admin. Code § NR 102.06(4)(b)1., the removal of that statewide water quality 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, pursuant to 40 CFR 131.21.

To look at this request from a strictly practical standpoint, Petitioners' request to invalidate the statewide phosphorus criterion for LCO makes no sense given what they assert is their actual interest in this case. The actual effect of the court invalidating Wis. Admin. Code § NR 102.06(4)(b)1. is that LCO would no longer have *any* water quality criterion for phosphorus. If Petitioners' real concern is the water quality and health of LCO, and Petitioners really believe that the only way to address that concern is by *lowering* the current phosphorus criteria, it is unclear how invalidating the only applicable numeric phosphorus criterion for LCO moves the ball toward their goal.

Regardless, Petitioners fail to demonstrate how DNR's promulgation of Wis. Admin. Code § NR 102.06(4)(b)1. was in violation of either Wis. Stat. § 281.15 or the Public Trust Doctrine. Therefore the court should deny Petitioners' request that the court invalidate Wis. Admin. Code § NR 102.06(4)(b)1.

CONCLUSION

DNR did not improperly or illegally deny the 2016 Petition for Rulemaking. DNR did not improperly or illegally determine that a phosphorus SSC for LCO is not legally or scientifically justifiable at this time and DNR properly created its 2018 TSD. DNR did not violate the Stipulation. DNR did

not improperly promulgate Wis. Admin. Code § NR 102.06(4)(b)1. The court should therefore deny Petitioners' requests for action.

Dated this 5th day of December, 2018.

Respectfully submitted,

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