

Select court documents related to Lac Courte Oreilles proposed site-specific criterion for phosphorus

Provided as reference material during the public comment period for rulemaking on the Lac Courte Oreilles phosphorus site-specific criterion (NRB Order # WY-09-17).

Materials are posted at: <https://dnr.wi.gov/news/input/proposedpermanent.html>.

The following materials are provided in this compilation. PDF page numbers provided below indicate the page numbers in red at the bottom right corner of the compiled PDF document.

<u>PDF page #</u>	<u>Document</u>
1-11	2017.04.04 Stipulation Case No. 16-CV-1564 (Admin. Agency Review 30607), <i>James Coors, et. al., v. Wisconsin Department of Natural Resources and Wisconsin State Cranberry Growers Association</i> .
12-61	2018.11.05 Petitioner’s Brief on the Merits Petitioner’s Brief on the Merits, <i>James Coors, et. al., v. Wisconsin Department of Natural Resources, et al.</i> , No. 16-CV-1564 (Wis. Dane Cnty. Cir. Mar. 22, 2019).
62-115	2018.12.05 Respondent’s Response Brief on the Merits Respondent’s Response Brief on the Merits, <i>James Coors, et. al., v. Wisconsin Department of Natural Resources, et al.</i> , No. 16-CV-1564 (Wis. Dane Cnty. Cir. Mar. 22, 2019).
116-141	2018.12.21 Petitioners’ Reply Brief Petitioners’ Reply Brief, <i>James Coors, et. al., v. Wisconsin Department of Natural Resources, et al.</i> , No. 16-CV-1564 (Wis. Dane Cnty. Cir. Mar. 22, 2019).
142-156	2019.03.07 Court Transcript Transcript of Oral Argument, <i>James Coors, et. al., v. Wisconsin Department of Natural Resources, et al.</i> , (Wis. Dane Cnty. Cir. Mar. 22, 2019) (No. 16-CV-1564)
157	2019.03.22 Court Order <i>James Coors, et. al., v. Wisconsin Department of Natural Resources, et al.</i> , No. 16-CV-1564 (Wis. Dane Cnty. Cir. Mar. 22, 2019).
158-165	2019.04.11 Brief in Support of Respondents’ Motion for Reconsideration Brief in Support of Respondents’ Motion for Reconsideration, <i>James Coors, et. al., v. Wisconsin Department of Natural Resources, et al.</i> , (Wis. Dane Cnty. Cir. July 2, 2019) (No. 16-CV-1564).
166-174	2019.05.13 Petitioners’ Response in Opposition to Motion for Reconsideration or Relief from Order

Petitioners' Response in Opposition to Motion for Reconsideration or Relief from Order, *James Coors, et. al., v. Wisconsin Department of Natural Resources, et al.*, (Wis. Dane Cnty. Cir. July 2, 2019) (No. 16-CV-1564).

- 175-180 **2019.05.29 Reply Brief in Support of Respondents' Motion for Reconsideration**
Reply Brief in Support of Respondents' Motion for Reconsideration, *James Coors, et. al., v. Wisconsin Department of Natural Resources, et al.*, (Wis. Dane Cnty. Cir. July 2, 2019) (No. 16-CV-1564).
- 181-187 **2019.07.02 Court Order**
James Coors, et. al., v. Wisconsin Department of Natural Resources, et al., No. 16-CV-1564 (Wis. Dane Cnty. Cir. July 2, 2019).

Note that the technical analysis documents referred to in this rulemaking package are not included in this compilation but are provided as separate document compilations (Petitioners' Technical Analyses; DNR's Technical Analyses). They are available with the materials for review with this rulemaking package at the website listed above.

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

DANE COUNTY

JAMES COORS, et al.,
Petitioners,

v.

Case No. 16-CV-1564

Administrative Agency Review: 30607

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, et al.,

Respondents,

and

WISCONSIN STATE CRANBERRY
GROWERS ASSOCIATION,

Intervenor-Respondent.

STIPULATION

Petitioners James Coors, Courte Oreilles Lakes Association, Inc., and Lac Courte Oreilles Band of the Lake Superior Chippewa ("Petitioners") brought this action by petitioning the Court, pursuant to Wis. Stat. §§ 227.40, 227.52-.57, and 806.04, to (1) review the Department of Natural Resources' ("DNR") decision not to promulgate required site specific water quality criteria for Lac Courte Oreilles, or in the alternative, (2) review the DNR's delay in promulgating procedures for site specific criteria (administrative rule package WT-17-12); (3) declare Wis. Admin. Code § NR 102.06(4)(b)1. and 3. invalid; and (4) declare that certain pollution

discharges to Lac Courte Oreilles are point source discharges. DNR disputes these allegations.

The parties wish to settle this matter by agreement and, therefore, enter into this stipulation (“Stipulation”). This Stipulation resolves Petitioners’ first through fifth claims as set forth in the Petition for Review filed June 10, 2016.

IT IS STIPULATED AND AGREED by the Petitioners, DNR and the Natural Resources Board (“Board”) (“Respondents”), and Intervenor Wisconsin State Cranberry Growers Association (as to claim five only), that Petitioners’ claims one through four¹ and the Wis. Stat. ch. 227 portion of claim five² shall be stayed and, upon completion of certain conditions contained herein, dismissed. The parties further agree that the declaratory judgment portion of claim five shall be dismissed without prejudice. The following terms and conditions govern this agreement:

1. The Circuit Court for Dane County, Wisconsin (“the Court”) has jurisdiction over the parties and the subject matter of this action.

¹ FIRST CLAIM, Review of Agency Action (Wis. Stat. § 227.52), The Letter from Susan Sylvester Was Not Authorized by Law; SECOND CLAIM (In the Alternative): Review of Agency Action (Wis. Stat. § 227.52), DNR’s Denial of Petitioners’ Petition is Premised on Erroneous Interpretations of Law, is Outside the Range of Discretion Delegated by Law, and is Arbitrary and Capricious; THIRD CLAIM (In the Alternative), Review of Agency Inaction (Wis. Stat. § 227.52), DNR’s Delay in Promulgating WT-17-12, and Therefore Delaying All Site Specific Criteria Determinations for a Decade, is Arbitrary and Capricious; FOURTH CLAIM (In the Alternative), Declaratory Judgment (Wis. Stat. § 227.40), The Phosphorus Standards in Wis. Admin. Code § NR 102.(4)(b)1. and 3. Are Unlawful. See Pet. for Judicial Rev. at 7-11 (June 10, 2016).

² FIFTH CLAIM, Review of Agency Action (Wis. Stat. § 227.52) and Declaratory Judgment (Wis. Stat. § 806.04), The Sylvester Letter Relies on an Erroneous Interpretation of Law to Conclude that All Phosphorus Pollution to Lac Courte Oreilles is “Nonpoint” Pollution. Pet. for Judicial Review at 11-12 (June 10, 2016).

2. This Stipulation shall apply to and be binding on the parties and on the successors and assignees of the parties.

3. The Stipulation shall incorporate the following terms, conditions, and deadlines relating to the development of a proposed phosphorus site-specific criteria (“SSC”) for Lac Courte Oreilles in Sawyer County, Wisconsin:

a. DNR agrees to propose a phosphorus SSC for Lac Courte Oreilles, inclusive of the East, Central, and West Basins and Stuckey Bay, Musky Bay, Chicago Bay, Brubaker Bay, Anchor Bay, and Northeast Bay, as authorized by Wis. Admin. Code § NR 102.06(7).

b. DNR will propose a scope statement for the development of a proposed phosphorus SSC for Lac Courte Oreilles. The development of a proposed phosphorus SSC for Lac Courte Oreilles will help inform and is related to the overall rulemaking effort associated with WT-17-12 (draft rule Wis. Admin. Code ch. NR 119) involving procedures for establishing phosphorus SSCs, and may be used by DNR to demonstrate the level of analysis that is needed when developing a phosphorus SSC. DNR agrees to submit a scope statement for the development of a proposed phosphorus SSC for Lac Courte Oreilles to the Governor for approval no later than May 15, 2017, in accordance with Wis. Stat. § 227.135(2). At least two weeks prior to presenting the scope statement to the Governor, DNR shall share the scope statement with the Petitioners and Intervenor-Respondent for review and comment.

c. If the Governor approves the scope statement, within 30 days of that approval DNR will submit an electronic copy of the statement to the Legislative

Reference Bureau for publication in the Wisconsin Administrative Register in accordance with Wis. Stat. § 227.135(3). DNR will also provide a copy of the statement to the Secretary of Administration on the same day it submits the statement to the Register.

d. Within 60 days of publication of the scope statement in the Wisconsin Administrative Register, DNR will submit the scope statement to the Board for approval in accordance with Wis. Stat. § 227.135(2).

e. If the Board approves the scope statement, DNR agrees to develop a proposed phosphorus SSC for Lac Courte Oreilles as expeditiously as practicable, and no later than 150 days after Board approval of the scope statement. DNR acknowledges that the Courte Oreilles Lakes Association and its environmental consultant LimnoTech, Inc., have recommended a total phosphorus SSC for Lac Courte Oreilles of 10 parts per billion (“ppb”) as measured on a lakewide average, and may provide supplemental data during the course of the rulemaking process. DNR will evaluate and consider the data and rationale submitted by Courte Oreilles Lakes Association and LimnoTech, Inc. as the agency prepares its proposed SSC, as well as any other data or information submitted by Petitioners or other members of the public.

f. Counsel for DNR will notify counsel for Petitioners via email of the completion of each step identified in subparagraphs 1.3.b. through e. above.

g. DNR will meet with Petitioners within 30 days of calculating the proposed SSC for Lac Courte Oreilles. The parties at that time will discuss the status

of the overall rulemaking effort, dismissal of the remaining portions of the case, consistent with paragraph 9 below, and an estimated timeline for the remaining steps in the rulemaking process. DNR will develop that estimated timeline in consultation with Petitioners.

h. DNR will move through the remaining rulemaking process as expeditiously as possible, consistent with the requirements of the statutory and regulatory frameworks governing the rulemaking process. Petitioners can track the progress of the remaining rulemaking effort through the Wisconsin Legislature administrative rules website. If the Petitioners are not satisfied that the DNR is proceeding with the remaining rule steps in good faith and as expeditiously as possible consistent with the estimated schedule, the Petitioners may seek Court involvement as specified in Paragraphs 6 through 9.

4. Nothing in this Stipulation waives Petitioners' right to challenge the procedural development or sufficiency of any phosphorus SSC for Lac Courte Oreilles promulgated pursuant to the process established by this agreement, or otherwise. Nothing in this Stipulation waives any defenses Respondents may have to any such challenge.

5. Nothing in this Stipulation prevents or prohibits Petitioners from submitting to DNR, at any time, a new petition for rulemaking for SSC on Lac Courte Oreilles, or from filing a court action related to the new petition, should the SSC for Lac Courte Oreilles fail to be promulgated as a final rule, become unreasonably delayed, or contain criteria that in the reasonable judgment of Petitioners is

insufficiently protective of Lac Courte Oreilles. Nothing in this Stipulation waives any defense Respondents may have to any such petition or action.

6. The parties agree that the stipulated deadlines in Paragraph 3 may be reopened in the event that there are circumstances beyond DNR's control that delay compliance with the stipulated timeline, despite DNR's reasonable efforts to fulfill its obligations. Events beyond the control of DNR for purposes of this Stipulation include, but are not limited to, actions taken or comments submitted by the Governor, the Legislature, or the U.S. Environmental Protection Agency during the rulemaking process. DNR shall make all reasonable efforts to minimize delays in fulfilling its obligations.

7. Should DNR claim an event which constitutes an event beyond its control that may unreasonably delay the stipulated timeline, counsel for DNR shall notify the Petitioners' counsel via email and U.S. Mail of the existence of and facts supporting the claim within 15 days of the events giving rise to such claim. The parties shall make a good faith effort to develop a revised timeline. If the parties cannot reach an agreed-upon resolution to develop a revised timeline within 30 days after receipt of the electronic copy of the notice, any party may move this Court to resolve the dispute.

8. In the event of a dispute between the parties concerning the interpretation or implementation of any other aspect of this Stipulation or the Order for Partial Stay and Partial Dismissal, the disputing party shall provide the other parties with a written notice via email and U.S. Mail outlining the nature of the

dispute and requesting informal negotiations. If the parties cannot reach an agreed-upon resolution of the dispute within 30 days after receipt of the electronic copy of the notice, any party may file a motion with this Court to resolve the dispute.

9. Upon DNR's completion of the steps identified in subparagraphs 3.a through 3.g., above, the Parties agree that the remaining portions of the petition for judicial review be dismissed. Petitioners will notify the court of the completion of the steps in 3.a. through 3.g. above within 30 days of the meeting held pursuant to subparagraph 3.g. After dismissal, should the parties fail to resolve a dispute regarding the interpretation or implementation of any remaining aspect of this Stipulation or the Order for Partial Stay and Partial Dismissal, the Petitioners reserve their right to reinstate litigation regarding claims one through four and the Wis. Stat. ch. 227 portion of claim five. Should that occur, the parties agree that it would be in the interests of judicial economy to seek leave of this Court to hear this matter. Respondents agree not to challenge the timeliness of claims one through four and the Wis. Stat. ch. 227 portion of claim five should Petitioners ask this Court to resume litigation or grant them relief from judgment after dismissal. Otherwise, Respondents and Intervenor-Respondent reserve all other claims and defenses that are available. Petitioners reserve their right to bring the declaratory judgment portion of claim five at any time, in any venue.

10. All notices required to be sent to any party as provided herein shall be provided to each undersigned attorney, unless notice is provided to the parties that a different person should receive the notice.

11. The parties agree that this Stipulation sets forth the entire understanding of the parties with respect to the subject matter herein.

12. An Order for Partial Stay and Partial Dismissal may be entered incorporating the terms of this Stipulation without further notice.

Dated this 31st day of March, 2017.

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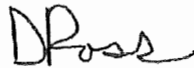
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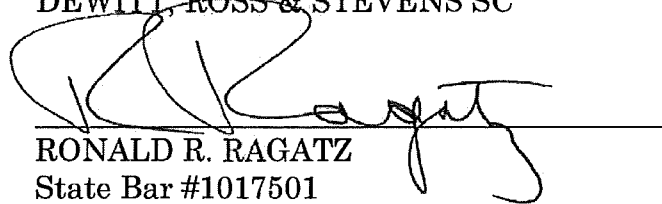
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Dated this 31ST day of March, 2017.

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A handwritten signature in black ink, appearing to read 'R. Ragatz', is written over a horizontal line.

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FILED
11-05-2018
CIRCUIT COURT
DANE COUNTY, WI
2016CV001564

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

DANE COUNTY

JAMES COORS, et al.,

Petitioners,

Case No. 16-CV-1564

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, et al.,

Respondents.

PETITIONERS' BRIEF ON THE MERITS

TABLE OF CONTENTS

	<u>Page</u>
Facts	2
Lac Courte Oreilles and Its Fishery	2
Pollution Threats to Lac Courte Oreilles	4
Efforts to Improve Lake Water Quality	6
The 2016 Petition for Site-Specific Rulemaking	8
The Parties' Stipulation.....	10
The DNR Does Not Propose an SSC.....	11
Procedural History	13
The Current State of the Lake	13
Regulatory Background	14
Wisconsin's Authority to Protect Water Quality	14
Water Quality Standards Must Protect the Public Interest.....	16
The DNR's Implementing Regulations Require Protection of Fishing and Other Designated Uses	17
Argument.....	19
I. The DNR Violated the Stipulation.....	19
A. Standard of Review.....	20
B. The DNR Failed to Propose an SSC, Violating the Stipulation.....	20
II. The DNR Improperly Denied Petitioners' Request for Site-Specific Rulemaking.....	22
A. Standard of Review.....	22
B. The DNR Improperly Denied Petitioners' Request for Site-Specific Phosphorus Rulemaking for Lac Courte Oreilles.....	24

1. The DNR’s 2016 Denial Was Procedurally Flawed, and Suffered from Errors in Law, Discretion, and was Arbitrary and Capricious. 25

2. The DNR’s 2018 Technical Support Document Was Based on an Erroneous Interpretation of Law and Exercise of Discretion, and Issues of Fact Demand Remand. 31

III. The 15 mg/L Standard for Phosphorus in NR 102.06(4)(b)1. is Unlawful Because It Conflicts with Wis. Stat. § 281.15(1) and (2)(b), exceeding the scope of DNR’s statutory authority, and WITH the Public Trust Doctrine. 37

A. Standard of Review 37

B. Wis. Admin. Code § NR 102.06(4)(b)1 must be declared invalid because it exceeds the scope of DNR’s statutory authority. 38

C. The Rule Should Be Declared Invalid Because it Violates the Public Trust Doctrine. 45

Conclusion.....46

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

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

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

- I. Whether DNR Violated the Stipulation.

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

FACTS

Lac Courte Oreilles and Its Fishery

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

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

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

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

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

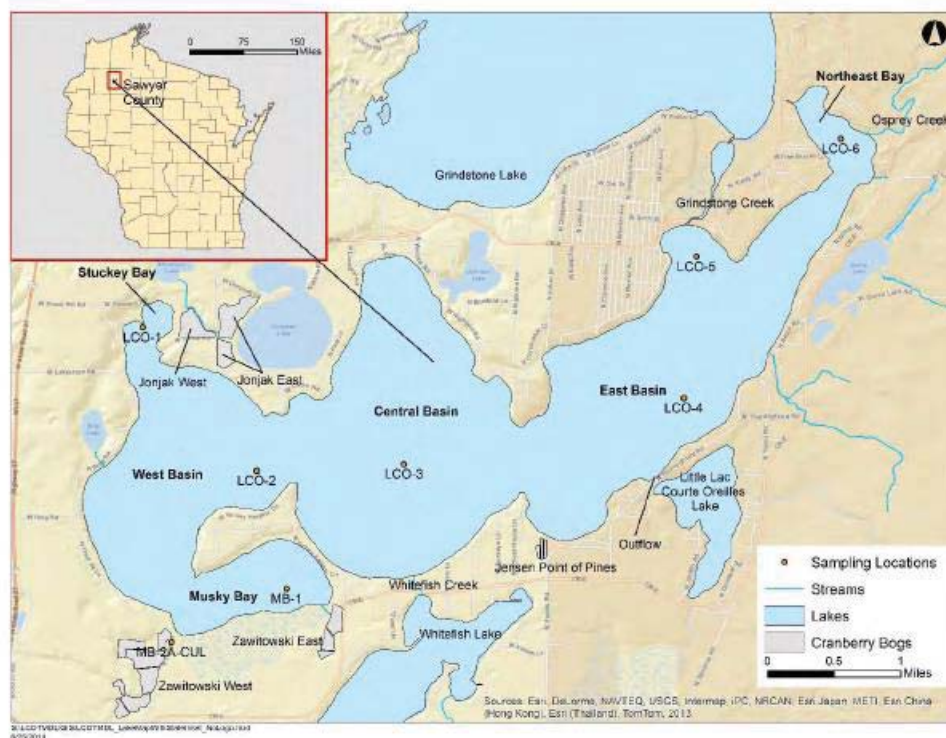


Figure 1. Location of Lac Courte Oreilles

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

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

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

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

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

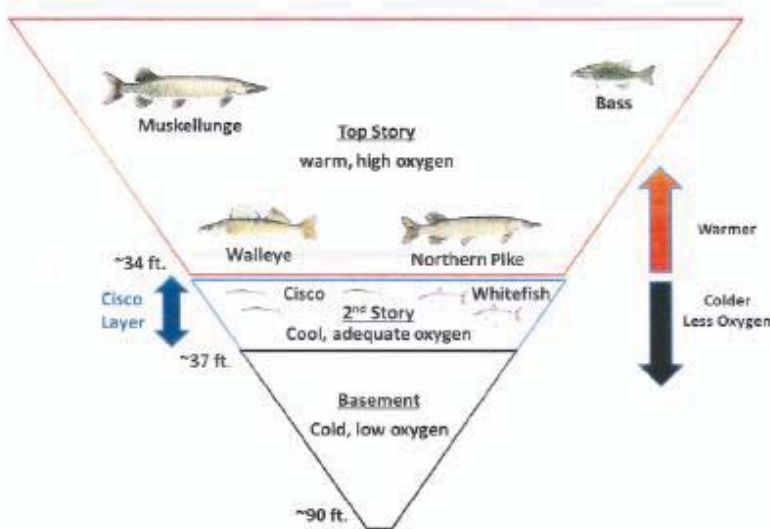


Figure 10. Typical two-story fishery in LCO, late summer.

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

Pollution Threats to Lac Courte Oreilles

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

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

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

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

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

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

Efforts to Improve Lake Water Quality

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

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

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

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

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

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

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

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

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

(R.2466.)

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

The 2016 Petition for Site-Specific Rulemaking

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

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

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

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

It concluded:

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

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

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

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

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

The Parties’ Stipulation

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

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

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

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

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

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

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

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

The DNR Does Not Propose an SSC

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

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

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

Procedural History

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

The Current State of the Lake

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

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

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

REGULATORY BACKGROUND

Wisconsin’s Authority to Protect Water Quality

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

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

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

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

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

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

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

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

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

Water Quality Standards Must Protect the Public Interest

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

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

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

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

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

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

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

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

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

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

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

¹⁰ See note 9, *supra*.

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

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

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

• • • •

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

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

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

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

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

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

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

ARGUMENT

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

I. THE DNR VIOLATED THE STIPULATION.

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

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

A. *Standard of Review.*

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

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

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

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

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

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

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

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

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

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

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

A. *Standard of Review.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷ See note 15, *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. *Standard of Review*

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

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

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

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

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

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

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

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

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

Id. (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 ug/1 is appropriate based on the 25th percentile of reference lakes in the northern lakes and forests ecoregion which encompasses most of Wisconsin (including, for example, Lac Court Oreilles). (*Id.*) Again, this is well below 15 ug/1.

In short, DNR laid out three external sources of evidence to support a much lower standard, acknowledged that a 15 ug/1 standard is unsupported by that evidence, and then promulgated it anyway, all while knowing that at least 84% of the two-story fishery reference lakes with available data in Wisconsin record concentrations of total phosphorus lower than 15 ug/1. (R.2730.) The standard is unreasoned and unsound.

Third, the DNR's methodology in setting the 15 ug/1 total phosphorus standard for two-story fishery lakes is inconsistent with its methodology in adopting standards for other lake types, rivers, and streams within the same TSD. For example, the DNR sets a total phosphorus standard of 40 ug/1 for shallow lakes (drainage, seepage, and reservoirs) by adopting exclusively the analysis and conclusions reached for these shallow lakes in the 2005 MPCA Report. (R.3971-3974, Doc.#128.) The same can be said of DNR's standard for deep-drainage lakes and deep reservoirs: the standard adopted tracks the analysis and conclusions of Minnesota. (R.3967-3970, Doc.#127.) This inconsistency demonstrates that DNR's justification for adopting a standard *higher* than what was supported by the very sources of evidence it cites was arbitrary.

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

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

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

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

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

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

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

CONCLUSION

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

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

Dated this 5th day of November, 2018.

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TABLE OF CONTENTS

Page 1

ISSUES PRESENTED	1
STATEMENT OF FACTS	1
I. Procedural History	1
II. General Lac Courte Oreilles Information	2
III. DNR’s denial of the 2016 Petition for Rulemaking.....	4
IV. DNR’s compliance with the Stipulation, creation of a technical support document and determination on a phosphorus SSC for LCO and Musky Bay.....	6
V. DNR’s promulgation of Wis. Admin. Code § NR 102.06(4)(b)1.	11
INTRODUCTION	16
ARGUMENT	20
I. DNR properly denied the 2016 Petition for Rulemaking.	21
A. Standard of Review.....	21
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.	22
C. The issue of whether DNR substantively and procedurally properly denied the 2016 Petition for Rulemaking is moot.	24
D. Ms. Sylvester Properly Communicated DNR’s Decision to deny the 2016 Petition for Rulemaking.....	25
E. DNR’s basis for denying the 2016 Petition was not legally erroneous, an abuse of discretion, or arbitrary and capricious.	29
II. DNR did not violate the terms of the Stipulation in its ability to create a phosphorus SSC for LCO.	31
A. Standard of Review.....	31
B. DNR must meet strict legal guidelines when developing a SSC.....	32

- 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. 35
- D. DNR complied with the Stipulation..... 37
- 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. 39
 - A. Standard of Review..... 39
 - B. DNR has the authority to promulgate rules in accordance with authorizing statutes..... 40
 - C. Wisconsin Admin. Code § NR 102.06(4)(b)1. is not inconsistent with Wis. Stat. § 281.15 42
 - D. Wisconsin Admin. Code § NR 102.06(4)(b)1 does not violate the Public Trust Doctrine..... 48
- CONCLUSION..... 50

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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FILED
12-21-2018
CIRCUIT COURT
DANE COUNTY, WI
2016CV001564

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

DANE COUNTY

JAMES COORS, et al.,

Petitioners,

Case No. 16-CV-1564

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

TABLE OF CONTENTS

Facts	1
Argument.....	2
I. Respondents Violated the Stipulation and Order.....	2
II. Respondents Improperly Denied the Petition for Site-Specific Rulemaking.....	3
A. This Issue is Not Moot.	3
B. The 2016 Denial Was Improper.....	5
1. The Board Should have Granted or Denied the Petition.....	5
2. The DNR Improperly Deferred a Decision on the Petition.....	7
C. The 2018 Denial Was Improper.....	10
1. The DNR Reads the Applicable Statutes Too Narrowly.....	10
2. The DNR’s Scientific Analysis Was Correspondingly Narrow.....	12
3. The DNR Should Have Granted the 2016 Petition for Site-Specific Rulemaking, and Set a Lower Phosphorus Standard that Assures Compliance.	15
III. The 15 mg/L standard for Phosphorus in Two-Story Fishery Lakes is Insufficiently Protective Under Wisconsin Law.	16
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.	16
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.....	20
Conclusion.....	23

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.

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 Env'tl. 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. The Board Should have Granted or Denied the Petition.

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. The DNR Improperly Deferred a Decision on the Petition.

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

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. The DNR’s Scientific Analysis Was Correspondingly Narrow.

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

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 on page 54 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

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 <15 mg/L [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 Env'tl. 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.

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1 THE COURT: This is 16CV1564, James Coors, et al.,
2 versus Wisconsin Department of Natural Resources, et al.
3 May I have the appearances, please?

4 MS. WESTERBERG: Good morning, your Honor. Christa
5 Westerberg and Alf Sivertson, admitted pro hac vice, here
6 for the petitioners, James Coors and Courte Oreilles Lakes
7 Association, Inc.

8 MS. STOLTZFUS: And Lorraine Stoltzfus, Assistant
9 Attorney General, for the Wisconsin Department of Natural
10 Resources.

11 MR. LINEHAN: And Attorney Dylann Linehan, your Honor,
12 here on behalf of Lac Courte Oreilles Band of Lake Superior
13 Chippewa Indians.

14 THE COURT: All right. Thank you. And I just looked
15 back, yes, this case was filed prior to me coming on the
16 bench. So let's see where we go from here today. I have
17 reviewed everything. And I have read the brief on the
18 merits, the responsive brief, and the reply brief. We have
19 had a previous hearing on whether we were going to consider
20 everything together or -- which I decided made the most
21 sense.

22 So I have read everything, but I will entertain any
23 argument the parties want to give me on this matter. And
24 then I do have some questions, so I may ask you some
25 questions. All right. I will let the petitioners start.

1 MS. WESTERBERG: Thank you, your Honor. And we have
2 been here in this Court for a while on in case, so it's nice
3 to finally be here on the merits. And there is a lot in the
4 record, but there is still a lot also that the parties agree
5 on I think. We agree I think that Lac Courte Oreilles is a
6 great recreational lake. It's a storied fishery, and it's
7 produced some record game fish. It also has tribal
8 significance, which Mr. Linehan can tell you about here in a
9 few minutes. But it's in big trouble. The cold water
10 fishery and recreational opportunities are declining.

11 Everyone agrees that low dissolved oxygen is the main
12 cause. And there is also some agreement that there is a
13 connection between phosphorous and that low dissolved
14 oxygen. And that's really probably not a surprise to those
15 of us who are not limnologists, that there is -- it's well
16 understood that higher levels of phosphorous in a water body
17 can produce algae and then low oxygen.

18 That's also what a circuit court judge found in 2006 --
19 Mr. Sivertson can tell you more about that if you are
20 curious -- when it considered a nuisance case against one of
21 the cranberry growers discharging phosphorous to the lake
22 which was brought by the State, actually, and Courte
23 Oreilles Lake Association together.

24 Curiously, Lac Courte Oreilles is still -- it's
25 currently attaining what DNR considers the appropriate

1 phosphorous standard for the lake. That's 15 micrograms per
2 liter. And what has puzzled us is how can something be in
3 compliance with the standard and still be impaired
4 biologically. And that's what the petitioners set out to
5 find a few years ago, and find out and hopefully to fix.
6 And they concluded that reducing total phosphorous in the
7 lake would help.

8 And because of that, in 2016 the petitioners asked DNR
9 to set a site-specific criteria for phosphorous of 10
10 micrograms per liter, lower than the 15 microgram per liter
11 standard that applies to all two-story fishery lakes in
12 Wisconsin.

13 Just as some background, phosphorous rules are
14 relatively new to Wisconsin, phosphorous standards for water
15 bodies. They were set in 2011 as a larger rulemaking. And
16 we agree that it's appropriate to set phosphorous levels for
17 water bodies. It's good to have those limits. But even the
18 DNR agrees that not all phosphorous standards fit all lakes,
19 and that's especially so for two-story fishery lakes like
20 Lac Courte Oreilles.

21 THE COURT: And that's what it's designated, right, a
22 two-story fishery lake?

23 MS. WESTERBERG: That's correct, your Honor. So when
24 the petitioners deployed their scientists to study this
25 issue some years ago, they found that Lac Courte Oreilles is

1 biologically impaired at that 15 microgram per liter default
2 standard. But the good news was that you can achieve some
3 biological improvements by reducing that standard to 10
4 micrograms per liter.

5 So we filed a petition for a site-specific rulemaking
6 with the DNR in 2016. The DNR initially denied that
7 petition to set the site-specific criteria because they
8 essentially said, you know, we are not going to do this
9 right now. We are doing some other rulemaking. We will get
10 back to this in a few years. And that led to our first
11 suit. Then in 2017 actually, DNR agreed to set a
12 site-specific criteria by stipulation and order signed by
13 this Court.

14 Almost a year later they backed off again, based on
15 their interpretation of the legal standard of what it takes
16 to set a site-specific criteria. And despite we have this
17 sort of err on the side of the public interest approach in
18 Wisconsin, but they interpreted their authority instead I
19 think very narrowly and made it almost impossible to achieve
20 a site-specific criterion.

21 So under the DNR's approach, you know, where are we
22 now? Nothing is going to change for the lake. In fact,
23 things are sure to get worse. Phosphorous can continue to
24 increase in the lake. The DNR may eventually create what's
25 called a total maximum daily load document for this oxygen

1 impairment, but the priority for doing so is low. So we
2 don't expect them to do that any time in the near future.

3 So it's unclear when we will ever have corrective
4 action for Lac Courte Oreilles. And it's also unclear,
5 based on the way the DNR interpreted its authority to set a
6 site-specific criterion, when one could be set for any water
7 body, at least that is more stringent than the default
8 standard.

9 Site-specific criterion can also be used to set a
10 standard higher or less protective. For example, they can
11 set a site-specific criterion at 20 for a two-story fishery
12 lake if the criteria in the rule are satisfied. But when it
13 comes to setting them that are more stringent and more
14 protective, the way that the DNR has interpreted its
15 authority in this case leads us to believe it will be nearly
16 impossible for anybody ever to do so.

17 So that's why we have asked for the Court to reverse
18 the decisions, the DNR's decision to deny the petition in
19 2016 and 2018, and as an alternative, to invalidate the
20 overall 15 microgram per liter standard set in the 2011
21 rulemaking because I think it was set too high to begin
22 with, and a lot of this could have been avoided had the DNR
23 set that standard lower to begin with, at 10 milligrams per
24 liter.

25 THE COURT: Thank you.

1 MR. LINEHAN: I just wanted to say on behalf of the
2 Tribe that the lake, half of it being located on
3 reservation, is of utmost importance to the Tribe. And it's
4 unfortunate, but the Tribe feels that at this time the
5 Wisconsin DNR is not appropriately safeguarding that lake
6 or its dual-story fishery. While Musky Bay is off
7 reservation, the effect has been felt throughout the entire
8 lake, and that's why the Tribe, alongside the other
9 petitioners, has joined this matter.

10 THE COURT: Thank you. All right. Anything else from
11 petitioners?

12 MS. WESTERBERG: Mr. Sivertson I think had something to
13 add, your Honor.

14 THE COURT: Sure.

15 MR. SIVERTSON: Your Honor, just two comments. The
16 first is that the DNR has really conceded the issue with
17 respect to the 15 parts per billion being too high to
18 support Lac Courte Oreilles as a two-story fishery. And I
19 direct your attention to page 41 of the petitioner's brief,
20 where they, based on their own studies, indicate that 15
21 parts per billion is too high. And quoting from their
22 study, they stated that, "Given the apparent conflict and
23 the relatively small number of these lakes, two-story lakes
24 may be candidates for site-specific criteria development."
25 So they concede that 15 parts is too high, and secondly,

1 they concede that given the problems of Lac Courte Oreilles
2 that a site-specific criteria lower than 15 parts per
3 billion would be appropriate.

4 And the only other comment I have, your Honor, is that,
5 you know, there is a lot of science in here, and what the
6 DNR has done is set a hundred percent standard for setting a
7 criteria. And as we know in just about any area of law,
8 whether it's medical malpractice or whatever it is, the
9 standard is a reasonable degree of scientific certainty.
10 It's not a hundred percent. And the DNR has put us in a
11 position where they are demanding a hundred percent
12 certainty that phosphorous is the driving force for the
13 water quality deterioration on Lac Courte Oreilles. And
14 that is inappropriate. So our science meets that reasonable
15 degree of scientific certainty that would support what we
16 are asking for. Thank you.

17 THE COURT: All right. Thank you.

18 MS. STOLTZFUS: Thank you, your Honor. I would like,
19 given that the record is huge and there is a couple things I
20 wanted to emphasize that were not emphasized in the brief, I
21 wanted to just give a few excerpts from the record.

22 So I will keep this brief in recognition of the fact
23 that the Court said that you reviewed everything. There
24 were a couple of things, however, that I wanted to just
25 emphasize that I believe are important for the Court to

1 consider in light of the arguments just made by the
2 petitioners.

3 The first thing I want to say is that there is no
4 question that everyone agrees that there are problems with
5 this lake. What we disagree about is whether it is known
6 exactly what to do to solve those problems. And I really
7 want to make the point that the decision needs to be based
8 on science, not on emotion. We can all be upset about fish
9 kills and about algae in the lake and things like that, but
10 we need to look at the science that is in front of the DNR,
11 and in front of the petitioners for that matter, to
12 determine whether the solution to the problems there really
13 is a 10 total phosphorous standard. So that's kind of the
14 preliminary thing I wanted to say.

15 Also, and I think that the petitioners touched on this,
16 but I want to make very clear that we are talking about two
17 completely different issues here. One is whether a
18 site-specific criteria is appropriate for this lake, for the
19 LCO, and the second is whether a 15 parts per billion total
20 phosphorous standard is appropriate for all two-story
21 fisheries in the lake. So it's two very different things,
22 and I just wanted to clarify that.

23 I think it's important to note that when the DNR
24 started looking at setting a site-specific criterion for
25 LCO, the staff did start with the hypothesis that total

1 phosphorous was indeed the problem. The analysis started
2 with the hypothesis that phosphorous is the primary driver
3 of the oxygen depletion in LCO. But the science, as they
4 really looked into it, did not support that hypothesis.

5 So this is where we get to, and I won't go into huge
6 detail, but we get into the science that really matters. So
7 a couple things I want to point out that I think are very
8 compelling in terms of what DNR looked at. One is paragraph
9 two of page two of the document that DNR did on May 16,
10 2018. And it's after the DNR technical support document.
11 Kind of the second attachment there. And the petitioners
12 have talked a lot about studies that show phosphorous is a
13 problem. They extrapolate that to say that phosphorous is
14 the problem with LCO.

15 And there is just one sentence that I actually want to
16 read that I think really matters. And this is from much
17 more recent studies than the general studies that the
18 petitioners have been citing. It's from a 2017 paper. And
19 the author of the study said, "Considerable work has been
20 done to identify parameters responsible for hypolimnetic
21 oxygen consumption, yet the key processes are still debated.
22 Much to the irritation of lake managers, decreasing
23 phosphorous loads to lakes has often not resulted in a
24 decrease in oxygen consumption in the hypolimnia." Now,
25 again, this is speaking in general terms. And I to a

1 certain extent fault the petitioners for only looking at
2 general terms.

3 THE COURT: Let me ask you this.

4 MS. STOLTZFUS: I am sorry. Sure.

5 THE COURT: I am not here to debate whether or not the
6 criteria, whether phosphorous is or isn't the cause of the
7 deteriorating lake. Everybody agrees that the lake is in
8 trouble. But what I am here to decide is, first of all, how
9 do you explain the fact that in 2016 or 2017 I signed an
10 order that says that the DNR would comply with the
11 stipulation and produce a site-specific criteria? My
12 understanding is the DNR has not done that. Correct?

13 MS. STOLTZFUS: That is correct.

14 THE COURT: All right. Well, that's an order. That's
15 a stipulation. Why is this not a contract issue? Or an
16 order that the Court signed incorporating the stipulation,
17 which would end up having the DNR being in contempt of court
18 because they have agreed to do this and they haven't done
19 it?

20 MS. STOLTZFUS: Well, your Honor, the problem is the
21 DNR tried to do it. It went back, it looked at all -- we
22 did the first steps, did a scope statement, took that to the
23 board, had that go to the Governor.

24 The problem is that when DNR set about determining what
25 the actual number should be for this specific lake -- it

1 needs to be the specific lake, not general -- DNR was unable
2 to determine that there was a site-specific number that was
3 appropriate. And that's the problem.

4 The science -- I am not sure what went into the
5 previous stipulation because I wasn't involved. But I know
6 that there was good faith -- I have talked with the attorney
7 who dealt with it at the time -- there was good faith in
8 thinking that this was something that DNR could do. And
9 that's why I guess I wanted to emphasize that DNR started
10 with the hypothesis that there would indeed be an
11 appropriate site-specific criterion for total phosphorous
12 for this lake. The problem is there isn't a number that
13 fits the science. And I don't quite know what to say in
14 terms of the stipulation and the order except that it
15 reached a point where it wasn't possible to do a
16 site-specific number.

17 THE COURT: I guess I struggle with that, because
18 Wisconsin Statute 281.15(2)(c) requires the DNR to establish
19 criteria which are no more stringent than reasonably
20 necessary to assure attainment of the designated use for the
21 water bodies in question. Water bodies in question here is
22 a two-story fishery. I am not a fisherman, so I really
23 don't know what that means, but I know it's important. And
24 also, two-story fishery lakes like the water body at issue
25 here are the most appropriate water bodies for site-specific

1 criteria. That's NR 102.06(7).

2 And so it seems to me that you have a lake that
3 everybody says is in trouble, the parties reach an agreement
4 that says there is going to be a site-specific criteria,
5 that the body of water needs one, the Court signs that
6 order, and now I come back a year later and the answer is,
7 well, we can't do it, so we are not going to do it. Well,
8 that's not, in my mind, good enough. It seems to say that
9 the DNR is claiming that unless there is a hundred percent
10 certainty that this is going to work, then we don't need to
11 do it because it's not more stringent than reasonably
12 necessary.

13 Under the state of the law now, the Wisconsin Supreme
14 Court says that we don't defer to conclusions of law, we
15 give respectful appropriate consideration, but we have to
16 exercise our independent judgment interpreting the
17 requirements of the statute and the administrative code.

18 The DNR's reading would give just bare minimum
19 standards. And that is inconsistent with 281.11, where the
20 department shall protect, maintain, and improve the quality
21 of management of the waters of the State. And also saying
22 that two-story fishery lakes are the most appropriate for
23 site-specific criteria. That's what we have here.

24 We have a stipulation and an order. And I don't need
25 to get into the science, and frankly the science is pretty

1 much over my head, but I do know that the DNR agreed to the
2 stipulation. I signed it. It is an order. I have not
3 heard any reason or justification that the DNR can't comply
4 with it.

5 So before I get to the merits, I am sending this back
6 to the DNR to propose a site-specific criteria. And then if
7 that doesn't resolve the issue, then the parties will do
8 whatever they need in the future. But that's what the
9 parties agreed to. I am going to enforce that. And that's
10 my order. All right? Any other questions? You want to
11 draft an order?

12 MS. WESTERBERG: Be happy to, your Honor.

13 THE COURT: All right. Thank you. We are adjourned.

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1 STATE OF WISCONSIN)
) SS:
2 COUNTY OF DANE)

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I, Edward H. Johnson, hereby certify that I am the official court reporter for the Circuit Court, Branch 3, Dane County, Wisconsin, that I have carefully compared the foregoing 14 pages with my stenographic notes, and that the same is a true and correct transcript.

Dated at Madison, Wisconsin, this 12th day of March, 2019.

Edward H. Johnson, RPR, CRR
Registered Professional Reporter

DATE SIGNED: March 22, 2019

Electronically signed by Judge Valerie Bailey-Rihn
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

DANE COUNTY

JAMES COORS, et al.,

Case No. 16-CV-1564
Case Code. 30607, 30701

Petitioners,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, et al.,

Respondents.

ORDER

The parties appeared at a hearing in this matter on Thursday, March 7, 2019. Present at the hearing were Attorneys Christa Westerberg and Alf Sivertson, on behalf of Petitioners James Coors and Courte Oreilles Lakes Association, Inc.; Attorney Dyllan Linehan, on behalf of Petitioner Lac Courte Oreilles Band of the Lake Superior Chippewa; and Attorney Lorraine Stoltzfus, on behalf of Respondents Wisconsin Department of Natural Resources and Wisconsin Natural Resources Board. For the reasons stated on the record, the Respondents are directed to comply with parties' April 4, 2017, Stipulation and the Court's April 5, 2017, Order, and propose a site-specific phosphorus criterion for Lac Courte Oreilles.

IT IS SO ORDERED.

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:
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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

DANE COUNTY

JAMES COORS, et al.,

Petitioners,

Case No. 16-CV-1564

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, et al.,

Respondents.

PETITIONERS' RESPONSE IN OPPOSITION TO MOTION FOR
RECONSIDERATION OR RELIEF FROM ORDER

Petitioners James Coors and Courte Oreilles Lake Association, Inc., by the undersigned counsel, submit the following response to Respondents Wisconsin Department of Natural Resources et al.'s ("Respondent" or "DNR") Motion for Reconsideration or Relief from Order.

Over two years ago, the DNR and Petitioners stipulated to resolve some issues in this administrative agency review case brought under Wis. Stat. § 227.52 and Wis. Stat. § 227.40. (Stipulation, 4/4/17.) Now, the DNR is attempting to avoid its promises under the Stipulation and two Court orders requiring compliance. (Orders, 4/5/17, 3/22/19.) The Court should deny the DNR's motion and make such other orders as it deems necessary to finally obtain the agency's compliance.

ARGUMENT

- I. The DNR Has Not Acknowledged or Satisfied the Legal Standard for Obtaining a Motion for Reconsideration or a Motion for Relief from Order.

The DNR does not recite or acknowledge the standard of review for a motion for reconsideration or, to the extent applicable, a motion for relief from order.

“To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law.” *Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 685 N.W.2d 853 (citing *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)). “Manifest error” is not demonstrated by the “disappointment of the losing party,” but is instead the “wholesale disregard, misapplication, or failure to recognize controlling precedent.” *Id.*

The DNR has not satisfied this standard. It has not introduced or identified any newly discovered evidence as part of its motion. In fact, the DNR cites the same record that has been available to the Court and to the parties all along. (*E.g.*, DNR Br. in Supp. of Mot. for Reconsid. at 4, Dkt. #230.) It also has not claimed that the Court made any manifest error of law. Its brief is largely composed of arguments already made in earlier briefing and that the Court rejected, or expanded-upon versions of arguments it already made or could have made but did not. (*Compare* DNR Resp. Br. at 31-38, Dkt. #221, *with* DNR Br. in Supp. of Mot. for Reconsid. at 1-7, Dkt. #230.) These are precisely the kind of grounds courts have rejected for reconsideration. *Koepsell*, 275 Wis. 2d 397, ¶ 44 (upholding denial of reconsideration where the movant “merely took umbrage with the court’s ruling and rehashed old arguments,” did not “demonstrate that there was a disregard, misapplication or failure to recognize controlling precedent,” and baldly asserted that the circuit court failed to consider certain arguments); *see also Schapiro v. Pokos*, 2011 WI App 97, ¶ 18, 334 Wis. 2d 694, 706, 802 N.W.2d 204 (upholding denial of reconsideration where movant

“merely repeated the same arguments raised during the hearing and in his earlier briefs”).

The Court should deny the motion for reconsideration on this basis alone.

To the extent the DNR styles its motion as a “motion for relief from order” under Wis. Stat. § 806.07(1) (Mot. at 2, Doc.#231),¹ it does not state which of the grounds in Wis. Stat. § 806.07(1)(a)-(h) justifies relief. Moreover, the DNR does not clearly state the order(s) from which it seeks relief. Its motion does seek relief from the Court’s March 22, 2019, Order, which repeated the DNR’s agreement in the Stipulation to “propose a phosphorus SSC for Lac Courte Oreilles.” (DNR Br. at 1, Doc.#230.) However, it also appears to seek relief from the Court’s April 5, 2017, Order accepting and ordering compliance with the parties’ Stipulation filed April 4, 2017, and even from the Stipulation itself, which it asks the Court to declare void. (*Id.* at 1, 6.)

The grounds for review and applicable order makes a difference, since the time for filing a motion for relief from judgment or order depends upon the subsection under which relief is sought. *See* Wis. Stat. § 806.07(2). If the grounds are Wis. Stat. § 806.07(1)(d)-(h), the DNR has not made this motion within a reasonable time as to the Court’s 2017 Order, entered over two years ago. Furthermore, the DNR has not developed its arguments under Wis. Stat. § 806.07 or otherwise explained why the Court should exercise its discretion to relieve it from the Stipulation and orders directing compliance with the same. For example, if its motion is made under Wis. Stat. § 806.07(1)(h), the DNR has not argued or demonstrated that “extraordinary circumstances” exist that would justify relief from order. *See In re Commitment of Sprosty*, 2001 WI App 231, ¶ 17, 248 Wis. 2d 480, 636 N.W.2d 213.

¹ The DNR’s motion is styled as a “Motion for Reconsideration or Relief from Order,” but the supporting brief is only a “Brief in Support of Respondent’s Motion for Reconsideration.” (See Doc. ##230, 231.) The brief does not cite or discuss Wis. Stat. § 806.07, though the motion does.

Reconsideration of or relief from the Court's 2019 and 2017 Orders is not warranted, as further explained below.

II. The Court Should Deny the DNR's Motion.

The primary basis for the DNR's motion is that this is a contract case, and that contract law principles—as well as facts of record it has already discussed in prior briefing—should permit it to avoid setting an SSC. The DNR is incorrect.

First, this is not a contract case. It is an administrative agency and declaratory judgment case, within which the DNR agreed to a Stipulation in order to resolve some of the Petitioners' claims under Wis. Stat. §§ 227.50 and .52. The DNR cites the Court's question at the March 12, 2019, hearing, "Why is this not a contract issue?" (DNR Br. at 1-2.) But it fails to cite the Court's very next sentence: "Or an order that the Court signed incorporating the stipulation, which would end up having the DNR being in contempt of court because they have agreed to do this and they haven't done it?" (Hr'g Trp. at 11:15-19.)

This is a matter of judicial order, not contract. "Although stipulations of settlement have occasionally been referred to as contracts, they are not governed by contract law." *Lueck's Home Imp., Inc. v. Seal Tite Nat., Inc.*, 142 Wis. 2d 843, 419 N.W.2d 340 (Ct. App. 1987). Rather, when an order is entered pursuant to the consent of the parties to be bound thereby, it is a judicial act, subject to the court's continuing jurisdiction to modify the order. *Id.* at 843, n.4 (citing *U.S. v. Swift & Co.*, 286 U.S. 106, 115, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932)). Principles of contract law may sometimes illuminate a stipulation dispute, but they are not binding. See *Phone Partners Ltd. Partnership v. C.F. Communications, Corp.*, 196 Wis. 2d 702, 710-11, 542 N.W.2d 159 (Ct. App. 1995). The proper way to obtain relief from a

stipulation is pursuant to Wis. Stat. § 806.07, *id.* at 710, but as discussed above, the DNR has not explained or elaborated upon why it should get relief under this section.

Second, to the extent contract law is relevant in *interpreting* the Stipulation's language, Petitioners brought this up in their opening brief. (Pets' Br. at 20, Doc.#219.) The DNR agreed in its response and had the opportunity then to elaborate on how contract law affected the case. (DNR Br. at 31, Doc.#221.) The DNR now claims, citing a case from 1872, that "long-standing" principles of contract law preclude its compliance with the Stipulation and Court's order. (*Id.*) To the extent this law is relevant, is obviously not new law and could have easily been cited in the DNR's prior brief. There is no basis to grant the motion for reconsideration or relief from judgment.

Third, the DNR is essentially arguing that complying with the Stipulation it agreed to and signed would violate state law. (DNR Br. at 2, Doc. #230.) The law has not changed since the Stipulation was signed, and nothing in the Stipulation violates the language of any state statute or regulation. The DNR is really arguing that setting the SSC would violate *its interpretation* of Wis. Stat. § 281.15(2)(c) and Wis. Admin. Code § NR 102.06(7). The Court has already rejected the DNR's interpretation as requiring "one hundred percent certainty" that the SSC is going to work, contrary to the DNR's duty under Wis. Stat. § 281.11 and other provisions to set standards that are protective of water quality and assure compliance with water quality standards. (*E.g.*, Hr'g Trp. at 12:17-14:4.) The DNR makes a newfound and conclusory statement that its interpretation only requires a "reasonable degree" of certainty, but this statement is undermined by its argument that there are "several other factors that may outweigh the effects of phosphorus on dissolved oxygen levels" in the lake, implying that these must all be ascertained before DNR can set a

phosphorus SSC and obtain certainty that the SSC will work. (DNR Br. at 5, Doc.#230.)

As the Petitioners have argued and the Court has found, the DNR's arguments are inconsistent with Wis. Stat. §§ 281.11 and .15, as well as Wis. Admin. Code § NR 102.06(7), which recognizes that two-story fishery lakes like Lac Courte Oreilles are most suited to a phosphorus SSC. (Hr'g Trp. at 13:7-12, 18-23; Pets' Br. at 32-37, Doc.#219; Pets' Reply Br. at 10-12, 15-16, Doc.#222.)

Fourth, the DNR claims the science does not support setting an SSC, but it points to the same record that was available during the parties' earlier briefing. The DNR now emphasizes one correlation in particular: that between 1988 and 1996, phosphorus was low in the lake, but so was dissolved oxygen. (DNR Br. at 4, Doc.#230 (citing R.4875, R.5763).) However, reviewing the record cite for this claim reveals that it is based on very few data points—only 2-3 per year, and in the East basin of Lac Courte Oreilles only. (*See* R.4875, Doc.#109.) After 1996, Courte Oreilles Lakes Association and the Tribe began taking more samples, and more recently—since about 2011—data show both high phosphorus levels and low oxygen levels. (*See* R.2755, 5750.) The DNR has also previously acknowledged the relationship in the literature between phosphorus and low dissolved oxygen, and that reducing phosphorus could help the lake. (R.4839; R.5746 (Doc. #209); R.5759 (Doc. #210).) Petitioners previously explained how DNR's narrow legal interpretation resulted in a narrowed approach to the science. (Pets' Reply Br. at 12-16, Doc.#222; Pets' Br. at 35-36, Doc.#219.)

The DNR also implies that the Petitioners have relied on data that is not specific to Lac Courte Oreilles. (*E.g.*, DNR Br. at 3.) However, Petitioners' initial petition for an SSC was in fact lake-specific, relying on data collected from Lac Courte Oreilles over a period of

years to recommend an SSC of 10 ppb. (R.2707-2771.) In fact, the DNR had this data in-hand when it signed the Stipulation and agreed to set an SSC for Lac Courte Oreilles, which suggests enough comfort with the data that the agency could sign the Stipulation. This Court should reject the DNR's backtracking.

Finally, contract law—even if relevant—does not support the DNR, nor should the Court grant DNR's request to declare the Stipulation void. The DNR relies primarily on two cases (DNR Br. at 2, 5-6), one of which generally states that contracts contrary to the provisions of a statute are void, *Melchoir v. McCarthy*, 31 Wis. 252, 254 (1872) (assessing whether account to sell liquor was illegal if it was made on Sunday and plaintiff lacked proper license), and another that interpreted the language of a consent order between the Department of Agriculture Trade & Consumer Protection (“DATCP”) and a defendant time-share operator, *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, 257 Wis. 2d 421, 651 N.W.2d 345. Neither case released a party from a stipulation and order because it was inconsistent with the law; in the latter, the court of appeals upheld the circuit court's denial of a request to modify a consent order on equitable grounds because DATCP engaged in alleged misconduct. *Id.* ¶ 30. The DNR generally relies on these cases to state it could only stipulate to what the law allows, but as just explained, the Stipulation is consistent with the law.

The DNR has not and cannot support its motion for reconsideration, on either the law or the facts, and the Court should deny it.

III. The Court Should Not Deem the DNR to have Complied with the Stipulation.

The DNR makes a few more contract-based arguments, including that it signed the Stipulation in good faith, and that DNR did comply with it because the agency followed the

Stipulation's enumerated steps as far as the applicable law (as DNR interprets it) allows. (DNR Br. at 6-7.) Again, these arguments should be rejected.

Because this case is not governed by contract law, the DNR's argument that it engaged in good faith and fair dealing is irrelevant. *See Peppertree Resorts*, 257 Wis. 2d 421, ¶ 28.

Furthermore, there is no argument in this case that the Stipulation is ambiguous. Whatever the agency's motives were when it signed the Stipulation, it has clearly not complied with the Stipulation or the Court's Orders to propose an SSC. The DNR admitted as much on the record at the March 2019 hearing:

The Court: But what I am here to decide is, first of all, how do you explain the fact that in 2016 or 2017 I signed an order that says that the DNR would comply with the stipulation and produce a site-specific criteria? My understanding is the DNR has not done that. Correct?

Ms. Stoltzfus: That's correct.

(Hr'g Trp. at 11:8-13.) Hence, even if relevant, there is no need to consider whether DNR violated any implied duty of good faith and fair dealing because the violation of the Stipulation's express terms, and the Court's orders directing compliance with those terms, is clear and of far greater concern.

The DNR's arguments that it complied with the Stipulation as far as it could, "until it reached roadblocks" (DNR Br. at 7) also does not equate to compliance and actually setting an SSC. There is simply no version of the applicable facts where DNR has complied with the Stipulation and the Court's orders. To the extent the DNR is arguing that equitable concerns under Wis. Stat. § 806.07(1) support a finding that it complied with the Stipulation, it—again—has not developed this argument and it should be rejected.

The Court should deny DNR's motion.

CONCLUSION

For the reasons stated above, the Court should deny the DNR's motion for reconsideration and relief from judgment, and make such other orders as are necessary to ensure the DNR's compliance with its orders of March 22, 2019, and April 5, 2017. If the Court finds the DNR in contempt or assesses sanctions against the DNR for non-compliance with the Court's orders, Petitioners reserve the right to move the Court to award its fees and costs for responding to the DNR's motion. *See* Wis. Stat. § 785.03(1)(a).

Dated this 13th day of May, 2019.

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Wisconsin Stat. § 806.07(2) requires that any motion for relief from order must be filed within a reasonable time; and in certain situations, not later than one year after the order was made. As shown above, DNR's motion was filed within 20 days, certainly a reasonable amount of time.

II. The motion is supported by the law and the facts.

A. Reconsideration is supported by Wisconsin law and by the facts in the Record.

To prevail on a motion for reconsideration, the movant must either present newly discovered evidence, or establish an error of law or fact. *Koepsell's Olde Popcorn Wagons v. Koepsell's Festival Popcorn Wagons*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 685 N.W.2d 853. Here, it is the position of Respondents that there was error of law and of fact in the March 22, 2019 order, and therefore Respondents request that the order be reconsidered. As discussed in Respondents' previous brief, the Court appeared to indicate in its discussion from the bench that it was interested in how contract law applied to this situation (Tr. 11:14–19), and therefore Respondents asked the Court to reconsider its ruling in light of contract law.

Principles of contract law, when applied to this case, show that the order was in error. (See Br. Supp. Resp't's Mot. Recons., 1–7 (Part I.)) Petitioners argue that contract law is not applicable, citing one 1987 case to the effect that settlement stipulations are not governed by contract law. *Lueck's Home Improvement v. Seal Tite Nat'l, Inc.*, 142 Wis. 2d 843, 419 N.W.2d 340 (Ct. App. 1987). However, newer Wisconsin cases quite clearly employ contract law to analyze the effect of stipulations. See *Johnson v. Owen*, 191 Wis. 2d 344, 349, 528 N.W.2d 511 (Ct. App. 1995); *State v.*

Peppertree Resort Villas, Inc., 2002 WI App 207, ¶ 13, n.8, 257 Wis. 2d 421, 651 N.W.2d 345 (“[I]t is not correct to read *Lueck’s* to hold that principles of contract construction do not apply to construing a consent order, particularly in view of the many recent cases that hold otherwise.”).

When contract law is applied to the stipulation in the case before this Court, it shows that Respondents may comply with its terms to the extent, but only to the extent, that applicable law permits. *Peppertree*, 257 Wis. 2d 421, ¶ 27. Accordingly, Respondents may propose a phosphorus site-specific criterion (SSC) only if it is authorized under the applicable legal standard. As discussed below, the available data and science that are applicable to the legal standard do not justify a phosphorus SSC for this specific lake. To the extent that any part of the March 22, 2019 order requires DNR to set a phosphorus SSC that is not scientifically and legally justified under Wis. Stat. § 281.15(2)(c) and Wis. Admin. Code § NR 102.06(7), Respondents ask the Court to find that discrete provision to be void.

Contract law, when applied to the Record in this case, also shows that Respondents acted in good faith in their efforts to develop a scientifically-supported phosphorus SSC for Lac Courte Oreilles (LCO). (Br. Supp. Resp’t’s Mot. Recons., 6–7 (Part. I.D.)) DNR staff began the SSC analysis with the hypothesis that low dissolved oxygen in LCO was indeed caused by high phosphorus levels. (R. at 5763.) Unfortunately, this hypothesis turned out not to be supported by the data specific to LCO. *Id.* The Record shows that DNR staff tried in good faith to validate the initial hypothesis, but were ultimately unable to do so. *Id.*

It was also an error of law for the Court to disregard the science in the Record. The Court stated, “I don’t need to get into the science.” (Tr. 13:24–25). This is an error because it is necessary to examine the science underlying DNR’s decision in order to determine whether that science supports the decision under the applicable law. For example, DNR discusses the data that show that lower phosphorus levels did not correlate with improved dissolved oxygen levels in LCO for the years 1988–96. (R. at 4875–4877, 5763.) Petitioners argue that this approach is “narrow” simply because this includes data points of two to three per year. They fail to acknowledge that the data show an aggregate picture for an eight-year period of time, which is far from narrow. They also fail to acknowledge that this is just one example of the data that was analyzed by DNR staff, an example highlighted by DNR because it is so compelling. In fact, the Record shows that DNR’s approach was far from narrow, but rather included analysis of many studies and information relevant to the attempt to justify a phosphorus SSC for LCO. (See R. at 4839–4905, 5757–5765.) The science discussed in the Technical Support Documents in the Record shows the reasons why DNR is unable to justify proposing a phosphorus site-specific criterion for LCO under the applicable law. (R. at 4869–4871, 5762–5765.)

In addition, it was an error of fact by the Court to state that DNR is requiring 100% certainty that lowering the phosphorus criterion in LCO will work to improve the lake. (Tr. 13:8–12) Petitioners have argued that DNR requires 100% certainty, but they are not correct. DNR has never required 100% certainty that high phosphorus levels are the cause of low dissolved oxygen in LCO. (Record as a whole).

Rather, what DNR does require is a reasonable degree of certainty, in order to comply with the provision in Wis. Stat. § 281.15(2)(c) that the criterion is “no more stringent than reasonably necessary”, and to comply with Wis. Admin. Code § NR 102.06(7), that the criterion decision must be made using “scientifically defensible methods and sound scientific rationale.” This approach is not new and conclusory, as argued by Petitioners, but is the approach that DNR has taken all along in order to comply with the law. (R. at 5762.) The science in the Record is analyzed extensively by DNR staff, and shows that it cannot support a phosphorus site-specific criterion to even a reasonable degree of certainty. *Id.* More study is needed to home in on which of the other processes that could reduce oxythermal habitat are implicated in LCO, in order to make everyone’s efforts result in actual improvement in the lake’s water quality. (R. at 4869–4871, 5763.)

These errors of law and fact, as set forth in more detail in Respondents’ initial brief, justify the request for reconsideration.

B. Relief from order is supported by Wisconsin law and by the facts in the Record.

To prevail on a motion for relief from order, there are a number of factors that can support that motion, including “any other reasons justifying relief from the operation of the judgment.” Wis. Stat. § 806.07(1)(h). Here, Respondents request relief from the order for the same reasons that support reconsideration, as well as some additional factors. First, the March 22, 2019 order requiring Respondents to propose a phosphorus SSC was based on several errors of law and fact that are discussed in part I.A. above.

Secondly, the March 22, 2019, order requires Respondents to develop a site-specific criterion in order to comply with the parties' April 4, 2017 Stipulation. Paragraph 3(a) of that Stipulation states that DNR agrees to propose a phosphorus SSC for LCO "as authorized by Wis. Admin. Code § NR 102.06(7)." As argued in Respondents' initial brief at Part II, Respondents have already complied with that stipulation to the extent they are able to do so under the applicable law and the site-specific science that is available for LCO. Because they have already taken all the steps they are able to take towards developing a phosphorus SSC for LCO, they should be relieved from the March 22, 2019 order that requires additional steps that Respondents cannot scientifically justify under the applicable law and science.

For all of the reasons in this reply brief and in Respondents' initial brief, Respondents request that the Court grant its Motion for Reconsideration or Relief from Order.

Dated this 29th day of May, 2019.

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FILED
07-02-2019
CIRCUIT COURT
DANE COUNTY, WI
2016CV001564

BY THE COURT:

DATE SIGNED: July 2, 2019

Electronically signed by Judge Valerie Bailey-Rihn
Circuit Court Judge

STATE OF WISCONSIN

**CIRCUIT COURT
BRANCH 3**

DANE COUNTY

JAMES COORS, et al.,

Petitioner

v.

Case No. 16CV1564

**WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,**

Respondents

ORDER

On March 22, 2019, this Court signed an Order that required the Wisconsin Department of Natural Resources, Respondents, to comply with the parties' Stipulation and Order entered on April 5, 2017. The Court also required that Respondents propose a site-specific phosphorous criterion for Lac Courte Oreilles as required by the parties' Stipulation. On April 11, 2019, Respondents filed a Motion for Reconsideration, asking the Court to reconsider the ruling from March 22, 2019. Respondents stated that the issue was best governed under the principles of contract law and that they had complied with the Stipulation to the extent of their abilities under Wisconsin law. The issue was fully briefed on May 29, 2019. Respondents present no newly

discovered evidence and the Court addressed and referenced the applicable statutes and administrative code during the March 22 hearing.

STANDARD OF REVIEW

In order to prevail on a motion for reconsideration, the moving party “must present newly discovered evidence or establish a manifest error of law.” *Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, LTD.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 (citing *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)). A party may not use a motion for reconsideration to introduce new evidence that could have been presented earlier. Further, on a motion for reconsideration, a manifest error of law is more than dissatisfaction with the resulting order. It is the “wholesale disregard, misapplication, or failure to recognize controlling precedent.” *Id.*

DISCUSSION

Under the appropriate standard for review, the moving party must either introduce newly discovered evidence or establish a manifest error of law to prevail on a motion for reconsideration. *Id.* Respondents concede in their Motion for Reconsideration that they are not alleging any newly discovered evidence. Resp. Reply Br. 2. Instead, Respondents allege that the court erred in its analysis of the laws controlling the DNR’s ability to propose site specific criteria. As such, Respondent will need to show that there was a “wholesale disregard, misapplication, or failure to recognize controlling precedent” in the previous decision of this Court. *Koepsell’s Olde Popcorn Wagons, Inc.*, 2004 WI APP 129 at ¶44. Based on the analysis below, the Court finds that this standard has not been met. Therefore, Respondents Motion to Reconsider is DENIED.

I. *Even if the Court views the Stipulation as a Contract, there is no Basis for a Grant of the Motion for Reconsideration*

Respondents ask the Court to view the Stipulation as a contract, stating that “[a] stipulation is a contract made in the course of judicial proceedings.” *Johnson v. Owen*, 191 Wis. 2d 344, 349, 529 N.W.2d 511 (Ct. App. 1995). Petitioners reject this claim, stating that “[a]lthough stipulations of settlement have been referred to as contracts, they are not governed by contract law.” *Lueck’s Home Imp., Inc. v. Seal Tite Nat. Inc.*, 142 Wis. 2d 843, 419 N.W.2d 340 (Ct. App. 1987) (citing *Burmeister v. Vondrachek*, 86 Wis.2d 650, 664, 273 N.W.2d 242, 248 (1979)). This apparent split in authority has been reconciled by the Court of Appeals:

“...[I]t was within the trial court's discretion to refuse to strictly adhere to contract law principles in considering whether to enforce the stipulation. As we explained in *Phone Partners*, because the enforcement of stipulations of settlement is committed to a trial court's discretion, contract law is not binding on the trial court as to the stipulation question.

Joseph Lorenz, Inc. v. Harder, 2005 WI App 59, ¶ 15, 280 Wis. 2d 557, 694 N.W.2d 510 (citing *Phone Partners Limited Partnership v. C.F. Communications Corp.*, 196 Wis. 2d 702, 709, 542 N.W.2d 159, 161 (Ct. App. 1995)). While contract law is not binding on this Court in its interpretation of a stipulation, it retains the discretion to apply contract principles to illuminate a stipulation dispute. *Phone Partners Limited Partnership*, 196 Wis. 2d at 710-11. The Court has the ability to modify the stipulation and order, and principles of contract law may be helpful, but not dispositive, in doing so. *Lueck’s Home Imp., Inc.*, 142 Wis. 2d 843, n.4 (citing *U.S. v. Swift & Co.*, 286 U.S. 106, 115, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932)).

Even assuming that the Stipulation is similar to a contract, the argument that the stipulation is void as a result of being contrary to a statute fails. As discussed below, the Stipulation is not in violation of any statutory language. As such, any analysis of good-faith efforts to comply with

the Stipulation by the DNR is not relevant. The DNR is still obligated to comply with the Stipulation and develop and propose an SSC for Lac Courte Oreilles.

II. The March 22, 2019 Order Does Not Require the DNR to Violate Wisconsin Law

Wis. Stat. §281.15(2)(c) requires the 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.” Wis. Admin. Code § NR 102.06(7) states that the DNR may establish a phosphorous site-specific criteria (SSC) “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) specifically states that two-story fishery lakes, such as Lac Courte Oreilles, are the most appropriate water bodies for site-specific criteria.

There is no question that the water body at issue is failing to achieve its “designated use” under the minimum standards set forth in Wis. Stat. § 281.15(2)(c). The body of water at issue has been on the impaired list since at least 2017. This is probably why the DNR agreed to a SSC when it signed the stipulation in 2017. However, the DNR now reads the relevant statutory language and administrative code as preventing the development and proposal of an SSC at Lac Courte Oreilles under the concern that a more stringent standard will not “guarantee” the attainment of the designated use, and thus be unlawful.¹ According to the DNR unless the SSC guarantees to improve the waters, it cannot be proposed without violating the “no more stringent than reasonably necessary to assure attainment” requirement.

However, this Court has reads the statutes in a manner that is less severe than the DNR. With regard to the administrative code, the Wisconsin Supreme Court recently “decided to end

¹ The Court recognizes that Respondents claim they do not require 100% certainty; however, the Court also notes that the practical effect of Respondent’s analysis seems to require substantially more certainty than the statute mandates.

[the] practice of deferring to administrative agencies' conclusions of law." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21. As such, while this Court has given respectful and appropriate consideration to the interpretations advanced by the DNR, but it is not bound by that interpretation and will exercise its independent judgment in interpreting the requirements of the statutory and administrative code at issue. In addition, it appears that the DNR's position is a new one, adopted after it signed the Stipulation and Order requiring it to develop a SSC. The same laws and facts were before the DNR at that time and the DNR willingly agreed to the Stipulation. Therefore, no deference is appropriate.

The Court believes that the DNR's reading of the requirements for establishing an SSC is incorrect in that it would lead to bare minimum standards that rarely protect the waters of Wisconsin. Wis. Stat. §281.15(2)(c) requires that the DNR focus on assuring attainment of the "designated use for the water bodies in question." The DNR's argued limitation on the statute—that it is prevented from acting when a proposed solution is not one hundred percent certain of success—seems to run counter to the goal of assuring attainment. The statute allows the DNR to exercise its discretion in deciding what is reasonably necessary to assure that the waters are suitable for their intended use. It does not require absolute proof or guaranteed success before the minimum standards can be exceeded; only that it is reasonably likely to work. "Reasonably necessary" by its definition requires the DNR to exercise discretion---to determine what SSC is appropriate to achieve success without being too restrictive.

In short, the Court reads Wis. Admin. Code § NR 102.06(7) as providing the means to justify a standard that is backed by the statute and necessary to 'assuring attainment.' The DNR is tasked with the obligation to "protect, maintain and improve the quality and management of the waters of the state." Wis. Stat. § 281.11. By using "scientifically defensible methods and

sound scientific rationale” to support an SSC, it seems that the DNR could establish an SSC that more adequately assures attainment, is no more stringent than reasonably necessary, and coincides with the broad purpose of the Department. Wis. Admin. Code § NR 102.06(7).

Furthermore, the DNR’s reading of the relevant text is further strained when Wis. Admin. Code § NR 102.06(7) specifically states that two-story fishery lakes, such as Lac Courte Oreilles, are the most appropriate water bodies for site-specific criteria. If the DNR is unwilling or unable to find scientific justification at a lake-type that it decided to use as an example, it is unclear when, if ever, the DNR would ever depart from the bare minimum standards, even when everyone concedes that they are failing. Simply put, the Court finds the window in which to develop and propose an SSC broader than the window advocated for by the DNR. The Stipulation that was previously agreed to remains valid, and the DNR needs to follow its requirements. If the DNR believed that it could not propose a SSC, it should not have entered into the stipulation in 2017. Nothing has changed except for the DNR’s decision to revisit its stipulation and this Court’s order. All of the facts and the law remain the same. This was the case before and remains the case today. Because of this, there is no manifest error of law that can result in the granting of the motion for reconsideration.

CONCLUSION

A Motion for Reconsideration requires the moving party to demonstrate either newly discovered evidence or a material error of law. That same moving party is precluded from rehashing the same arguments used prior to the Court’s ruling at issue. *See Oto*, 224 F. 3d at 606 (“Contrary to this standard, Beverly’s motions merely took umbrage with the court’s ruling and rehashed old arguments...As such, they were properly rejected by the District Court”).

The Court has heard and rejected Respondent's arguments that Wisconsin statutes and regulations create a narrow regulatory sweet spot for creating SSC's. The new assertion that the April 5, 2017 Stipulation and Order be read as a contract does not sway the Court's analysis for two reasons. First, the Court does not read the applicable regulations as prohibitively as the DNR; therefore, the alleged contract between the parties is not in violation of any Wisconsin law. Therefore, the Court DENIES Respondent's Motion for Reconsideration.