

Report to
Legislative Council Rules Clearinghouse
NR 102, Wis. Adm. Code
Natural Resources Board Order No. WY-09-17

Wisconsin Statutory Authority
Section 281.15, Stats.

Federal Authority

The Federal water quality standards regulation at 40 CFR 131.11(b)(1)(ii) provides States with the opportunity to adopt water quality criteria that are “modified to reflect site-specific conditions.” Wisconsin has used this authority, as well as the authority under 281.15, Wis. Stats., to promulgate the existing narrative phosphorus site-specific criteria language in s. NR 102.06(7), Wis. Adm. Code. The portions of 40 CFR 131 related to establishing water quality standards include:

- 40 CFR 131 Subparts A-C: Requirements for establishing state water quality standards.
- 40 CFR s. 131.4: States are responsible for establishing and revising water quality standards. U.S. EPA approves or disapproves standards under 40 CFR s. 131.5.
- 40 CFR 131.6: Water quality standards consist of designated uses and criteria to protect the designated uses.
- 40 CFR 131.11: States must adopt water quality criteria that protect designated uses. For waters with multiple uses, the criteria must protect the most sensitive use. 40 CFR 131.11(b)(1)(ii) authorizes states to adopt numeric water quality criteria that are “modified to reflect site-specific conditions.”
- 40 CFR 131.20: Revision of state water quality standards is subject to public participation procedures and U.S. EPA review and approval under 40 CFR 131.20.

Comparison of Adjacent States

Wisconsin has numeric phosphorus criteria for lakes, reservoirs, rivers, streams, and impounded flowing waters. Wisconsin’s phosphorus criteria for lakes and reservoirs vary by lake type with values ranging from 15 to 40 µg/L. As described in Section 3, Wisconsin statutes provide authority to develop site-specific criteria, and s. NR 102.06(7), Wis. Adm. Code, recognizes that site-specific criteria may be developed for phosphorus.

Minnesota has adopted phosphorus criteria for lakes, reservoirs, rivers and streams. Minnesota’s phosphorus criteria for lakes and reservoirs vary by ecoregion with values ranging from 12 to 90 µg/L. Minnesota allows specific water quality standards, referred to as site-specific criteria in Wisconsin, to be adopted when appropriate if information is available to derive standards based on a waterbody’s specific characteristics. This process is outlined in Minn. R. 7050.0220, 7050.0222, and 7052.0270. Site-specific standards must maintain and protect a waterbody’s beneficial uses. Several site-specific phosphorus criteria have been approved in Minnesota.

Illinois has adopted partial phosphorus criteria for lakes and reservoirs. Illinois’ phosphorus criteria for any lake or reservoir greater than 20 acres is set at 50 µg/L. Illinois does not have provisions for site-specific criteria.

Iowa, Indiana, Michigan and Ohio do not have statewide numeric phosphorus criteria. However, Michigan widely applies a method to derive appropriate site-specific phosphorus targets for

waterbodies in the state. Ohio has a longstanding approach for developing site-specific phosphorus targets using a weight of evidence approach based on several eutrophication indicators. The targets set by Michigan and Ohio are applied in permits and TMDLs.

Wisconsin, Minnesota, and Michigan are the main states in EPA Region 5 that have two-story fishery lakes supporting coldwater fish. Wisconsin's phosphorus criterion for two-story fishery lakes with cisco, whitefish, or lake or stream trout is 15 µg/L. Minnesota has a specified criterion for lakes with lake trout (the most sensitive species) of 12 µg/L, and for lakes with stream trout of 20 µg/L, but does not specify separate criteria for lakes with cisco or whitefish. In Minnesota, a lake such as Lac Courte Oreilles, which does not have lake or stream trout, would have a phosphorus criterion of either 30 or 40 µg/L under Minn. R. 7050.0222 (3) and (4). Therefore Wisconsin's statewide phosphorus criterion of 15 µg/L for Lac Courte Oreilles (Option B) is more stringent than Minnesota's comparable criteria of 30-40 µg/L for non-trout lakes. Option A (Petitioner's proposed site-specific criterion) would be even more stringent at 10 µg/L. Michigan does not have phosphorus targets specific to lakes with coldwater fish.

Court Decisions Directly Relevant

The Department is proposing a rule to establish a phosphorus site-specific criterion for Lac Courte Oreilles because the Department agreed to begin this rulemaking effort as part of a court-approved stipulation filed on April 4, 2017: Dane County Case No. 16-CV-1564 (Admin. Agency Review 30607), *James Coors, et. al., v. Wisconsin Department of Natural Resources and Wisconsin State Cranberry Growers Association*. The parties to this case include James Coors on behalf of the Courte Oreilles Lakes Association, Inc. and the Lac Courte Oreilles Band of Lake Superior Chippewa, the Wisconsin Department of Natural Resources (the Department) and Natural Resources Board. After reviewing and analyzing available data, the Department concluded it could not scientifically and legally support a more stringent phosphorus criterion for Lac Courte Oreilles pursuant to Wis. Stats. s. 281.15(2) and s. NR 102.06(7), Wis. Adm. Code. However, on March 7, 2019, the circuit court issued a decision directing the Department to propose a phosphorus site-specific criterion for Lac Courte Oreilles: *James Coors, et. al., v. Wisconsin Department of Natural Resources and Wisconsin State Cranberry Growers Association*. (March 22, 2019; March 7, 2019 Transcript.) The Department's subsequent motion for reconsideration was denied by the court. The Stipulation and circuit court's decisions are discussed in the analysis of the draft rule order and available on the Department's website with the other rule materials at <https://dnr.wi.gov/news/input/proposedpermanent.html>.

Analysis of the Rule - Rule Effect - Reason for the Rule

This rule proposes two alternatives for a phosphorus site-specific criterion for Lac Courte Oreilles, a lake in Sawyer County. The lake straddles both State land and Tribal lands of the Lac Courte Oreilles Band of Lake Superior Chippewa. Lac Courte Oreilles is a state-classified Outstanding Resource Water and one of a small number of "two-story fishery" lakes in Wisconsin that support a coldwater fishery within its deep basins. The three main basins of Lac Courte Oreilles support cisco and whitefish. The lake also has several small bays and a larger bay called Musky Bay, which are shallow and do not support coldwater fish. The lake has experienced several fish kills of cisco and whitefish in the main basins, likely due to reductions of its oxythermal layer during late summer. The oxythermal layer is the layer of water that is both cold enough and has enough dissolved oxygen to support coldwater fish. Multiple analyses have been done to determine the cause of the oxygen depletion in this lake, and specifically to determine whether a reduction of phosphorus levels in the lake is necessary to support the coldwater fish population.

Pursuant to s. NR 102.06(7), Wis. Adm. Code, and s. 281.15, Stats., the Department of Natural Resources (the Department) has the authority to develop a site-specific criterion in place of the generally applicable phosphorus criteria in s. NR 102.06, Wis. Adm. Code, if site-specific, scientifically defensible data and analysis demonstrate a different criterion is protective of the

designated use of the specific surface waterbody and, in accordance with s. 281.15(2)(c), Wis. Stat., the site-specific criterion is no more stringent than reasonably necessary to protect the designated use.

The Department is proposing rules to establish a phosphorus site-specific criterion for Lac Courte Oreilles because the Department agreed to initiate this rulemaking effort as part of a court-approved stipulation filed on April 4, 2017: Dane County Case No. 16-CV-1564 (Admin. Agency Review 30607), *James Coors, et. al., v. Wisconsin Department of Natural Resources and Wisconsin State Cranberry Growers Association*. The Department is proposing two options for comment: Option A: a site-specific criterion of 10 µg/L for the lake, to be assessed at the three deep basins that provide two-story fishery habitat, and Option B: no change to the existing criterion of 15 µg/L for the lake.

The technical analysis for the two options is available on the Department's website with the other rule materials at <https://dnr.wi.gov/news/input/proposedpermanent.html>.

Agency Procedures for Promulgation

The department will hold a hearing on November 8, 2019 at 10:00 a.m. at the Bass Lake Town Hall, 14412 W. County Hwy K, Hayward, WI 54843. The hearing will be followed by a request for board adoption, expected in December 2019, followed by a request for the governor's signature and legislative review.

Description of any Forms (attach copies if available)

N/A

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