

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WY-09-17

Relating to: Site-specific phosphorus criteria for Lac Courte Oreilles, Sawyer Co.

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

The rules will be proposed as permanent rules.

2. Detailed description of the objective of the proposed rule:

This rule addition would create phosphorus site-specific criteria (SSC) for a single lake, Lac Courte Oreilles, in Sawyer County. Pursuant to s. NR 102.06(7), Wis. Admin. Code, and Wis. Stat. s. 281.15, the Department of Natural Resources has the authority to develop an SSC in place of the generally applicable phosphorus criteria in ch. NR 102.06, Wis. Admin. Code, where site-specific, scientifically defensible data and analysis demonstrate a different criterion is protective of the designated use of the specific surface waterbody. Lac Courte Oreilles is a state-classified Outstanding Resource Water and one of the small number of lakes in Wisconsin that support a coldwater fishery. The lake straddles both State and Tribal land (Lac Courte Oreilles Band of Lake Superior Chippewa).

The Department is proposing rules to establish an SSC for Lac Courte Oreilles because the Department agreed to initiate this rulemaking effort as part of a court-approved settlement filed on April 4, 2017: 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*. In the stipulation, the DNR agreed 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 s. NR 102.06(7)” and to “propose a scope statement for the development of a proposed phosphorus SSC for Lac Courte Oreilles.” The DNR agreed to submit the scope statement to the Governor’s office by May 15, 2017 and continue through additional steps of the rulemaking process subject to approvals by the Governor, Natural Resources Board and Legislature. The parties to this case include James Coors on behalf of the Courte Oreilles Lakes Association, Inc. (COLA), the Lac Courte Oreilles Band of Lake Superior Chippewa (Tribe), the Wisconsin Department of Natural Resources (DNR) and Natural Resources Board, and the Wisconsin State Cranberry Growers Association.

The proposed SSC language for Lac Courte Oreilles would be a brief addition to the existing ch. NR 102.06, and/or other related sections of administrative codes if necessary.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Existing rule language under ch. NR 102.06(7), Wis. Admin. Code, specifies that the department may promulgate phosphorus site-specific criteria by rule. In addition to this existing code, the department is currently working on a rule package (WT-17-12) that would establish a standard protocol and streamlined process for establishing phosphorus SSC for specific waterbodies in the state. The rule proposed here for a Lac Courte Oreilles SSC is not contingent on, or duplicative of, rule WT-17-12, but is recognized in the

stipulation to be related to the overall rulemaking effort in WT-17-12. The proposed rule for Lac Courte Oreilles would be applicable only to the lake in question and does not constitute a new policy binding to other waterbodies.

Because this action is being taken pursuant to a court approved stipulation, other policy alternatives are not available at this time.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Section 281.15, Wis. Stat., authorizes the department to promulgate by rule water quality standards for surface waters or portions of surface waters in the state: “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.” Pursuant to s. 281.15, Wis. Stat., water quality standards are comprised of designated uses and criteria. The department has promulgated designated uses and criteria for various pollutants and parameters in chs. NR 102 through 105. The statewide criteria for phosphorus that were approved by USEPA are promulgated in s. NR 102.06. Site-specific criteria are criteria developed for individual waterbodies or groups of waterbodies with characteristics that warrant different criteria from those promulgated statewide.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule :

350 hours (total for all staff). This includes staff time spent developing the SSC, reviews by legal and management, public hearings, and rules coordination.

6. List with description of all entities that may be affected by the proposed rule :

- Courte Oreilles Lakes Association, Inc. and local residents and businesses: COLA is a petitioner in the settlement and is seeking site-specific phosphorus criteria to protect the coldwater fishery.
- Lac Courte Oreilles Band of Lake Superior Chippewa: The Tribe is a petitioner in the settlement and owns shoreland on part of the lake.
- Wisconsin State Cranberry Growers Association and local cranberry operators: The Association is an Intervenor-Respondant in the settlement. There are existing cranberry operations adjacent to Lac Courte Oreilles. DNR does not regulate cranberry operations under discharge permits; therefore these operations are not expected to be directly affected by the SSC.
- There are no regulated point source dischargers with WPDES (Wisconsin Pollutant Discharge Elimination System) permits that discharge pollutants to the lake, so establishing site specific criteria for the lake will not affect limitations in any WPDES permits. Any future permitted dischargers would be subject to the new criteria.
- Wisconsin Department of Natural Resources and U.S. Environmental Protection Agency: This would be the first phosphorus SSC developed by the department, and would ultimately need approval by EPA.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule :

The Federal water quality standards regulation at 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 Part 131 Subparts A and C include federal requirements for states for establishing and revising water quality standards. Revision of state water quality standards is subject to public participation procedures and EPA review and approval under 40 CFR 131.20. Wisconsin has authority under 281.15, Wis. Stats., to promulgate and revise water quality standards.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

Adoption of site-specific criteria for this location is not expected to involve any increased costs. There are currently no regulated point source dischargers within the watershed. This rule would not impose additional pollution reduction requirements for nonpoint sources. If an SSC were adopted, and even if the lake were listed as impaired and/or a Total Maximum Daily Load (TMDL) analysis were developed based on the SSC, the establishment of the SSC itself does not invoke any new regulatory requirements for nonpoint sources. Therefore, the economic impact of this rule is expected to be “Minimal (Less than \$50,000 per year)”.

9. Anticipated number, month and locations of public hearings:

The Department anticipates holding 1 public hearing during or before the month of Sept., 2018. The hearing city will be Spooner, WI. The Department will hold the hearing at this location to provide easy accessibility to those parties most directly affected within the watershed.

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