

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WY-21-20

Relating to: Site-specific phosphorus criteria for Lac Courte Oreilles

Rule Type: Permanent

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

The rule will be proposed as a permanent rule.

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

The objective of the proposed rule is to address development of phosphorus site-specific criteria for a single lake, Lac Courte Oreilles, in Sawyer County. Lac Courte Oreilles is a state-classified Outstanding Resource Water and one of the small number of lakes in Wisconsin that support a coldwater (or “two-story”) fishery. The lake straddles both state land and Tribal lands of the Lac Courte Oreilles Band of Lake Superior Chippewa.

Pursuant to s. NR 102.06(7), Wis. Adm. Code, and Wis. Stat. s. 281.15, the department has the authority to develop a site-specific criterion in place of the generally applicable phosphorus criterion in s. NR 102.06, Wis. Adm. Code, if site-specific, scientifically defensible data and analysis demonstrate a different criterion is necessary to protect the designated uses of the waterbody.

The department previously determined that the generally applicable phosphorus criterion of 15 ug/L is not protective for whitefish in the East Basin of the lake. In January, 2020, the department proposed a rule for consideration by the Natural Resources Board that would have revised the lake’s phosphorus criterion from the generally applicable 15 ug/L to 10 ug/L. At that time, the Board considered but did not approve that proposed rule and shortly thereafter the scope statement that authorized the department to consider rulemaking expired.

On June 10, 2020, the department received a new petition for promulgation of a permanent rule from the Courte Oreilles Lakes Association, Inc., and the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians. In the summer of 2020, new tools from the United States Environmental Protection Agency (EPA) became available for developing phosphorus criteria to maintain dissolved oxygen levels in coldwater fishery lakes like Lac Courte Oreilles.

By letter dated November 11, 2020, the department granted the petition to initiate rulemaking. This scope statement would allow that new rulemaking effort to begin.

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 s. NR 102.06(7), Wis. Adm. Code, specifies that the department may promulgate phosphorus site-specific criteria by rule. In addition to this existing code, the department has been working on two related rule packages:

- Rule package WT-17-12 would establish a standard protocol for establishing phosphorus site-specific criteria.
- Rule package WY-23-13 contains proposed criteria for coldwater lakes such as Lac Courte Oreilles. The oxythermal criteria in this rule are focused on oxygen levels to support coldwater fish.

The proposed rule for a Lac Courte Oreilles site-specific criterion is not contingent on, or duplicative of either of these draft rules, and it would be consistent with the processes outlined in those rules. The proposed rule for Lac Courte Oreilles would be applicable only to that lake.

The primary alternative to this rule proposal is to take no action. If a site-specific criterion is not developed for the lake to be protective of whitefish, then the existing statewide criterion for two-story fisheries of 15 ug/L total phosphorus will continue to apply. The statewide criterion of 15 ug/L has not been protective of the lake's fish and aquatic life designated use as a coldwater, two-story fishery lake, as evidenced by frequent low oxygen levels leading to fish kills in 2015 and 2016. While phosphorus levels alone are not responsible for the fish kills, the department has concluded that the current statewide criterion of 15 ug/L is not sufficiently protective of the aquatic life on this particular lake. Given this finding, in accordance with s. NR 102.06(7), Wis. Adm. Code, and Wis. Stat. s. 281.15, a site-specific criterion should be developed for this lake.

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

Wis. Stat. s. 281.15 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 Wis. Stat. s. 281.15, 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 EPA are promulgated in s. NR 102.06. The technical support document for the statewide phosphorus criteria specifically states that two-story fishery lakes may be candidates for phosphorus site-specific criteria. 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:

The department estimates that approximately 350 hours of staff time will be required to complete the proposed rule. This includes staff time spent developing site-specific criteria for Lac Courte Oreilles, 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: The association petitioned the department to begin rulemaking efforts to promulgate a site-specific criterion for Lac Courte Oreilles.
- Lac Courte Oreilles Band of Lake Superior Chippewa: One-third of Lac Courte Oreilles is located within reservation boundaries, with the rest of the lake located within the ceded territory. The Tribe is a joint petitioner on this rulemaking petition.
- Wisconsin State Cranberry Growers Association and local cranberry operators: There are existing cranberry operations adjacent to Lac Courte Oreilles.
- There are no regulated point source dischargers with WPDES (Wisconsin Pollutant Discharge Elimination System) permits that discharge pollutants to the lake, so establishing a site specific criterion for the lake will not affect limitations in any WPDES permits. Any future permitted dischargers would be subject to the new criterion.

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 Wis. Stat. s. 281.15 to promulgate and revise water quality standards.

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

Adoption of site-specific criteria for this location is not expected to involve any increased costs for any existing residences or businesses in the watershed and there are no expected economic impacts on small businesses. Adoption of a site-specific criterion is something that the lake association and the Lac Courte Oreilles tribe have requested. A site-specific criterion would provide area residents and businesses with a scientifically determined level of phosphorus for the lake that could be used as a guide for voluntary actions that could help to support the aquatic life in the lake. There are currently no regulated point source dischargers within the watershed that would be impacted by a site-specific criterion, and the adoption of a site-specific criterion would not impose any new regulatory pollution reduction requirements for nonpoint sources. Phosphorus levels in the lake are currently below the statewide phosphorus criteria.

If a lower site-specific criterion were adopted and the lake were listed as impaired in the future due to phosphorus levels that were above the new criterion, there still would be no new regulatory requirements for nonpoint sources. Discharges from any new point sources that became established in the watershed in the future would be required to meet the site-specific criterion, but these point sources would already be subject to more stringent requirements due to the status of the lake as an Outstanding Resource Water. The discharged wastewater from any new point sources would be required to be equal to or better than the background water quality of the lake. However, if the background water quality of the lake is not sufficiently protective, then the discharge concentration under the existing criterion may also be insufficiently protective.

With these considerations, 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 one public hearing in summer 2022. The hearing may be an online hearing hosted through remote teleconferencing technology.

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